TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 398

LOUISIANA POWER & LIGHT COMPANY,
PETITIONER,

vs.

CITY OF THIBODAUX.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 25, 1958
CERTIORARI GRANTED NOVEMBER 17, 1958

SUPREME COURT OF THE UNITED STATES

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[fol. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
—NEW ORLEANS DIVISION

No. 6444

Civil Action

CITY OF THIBODAUX

versus

LOUISIANA POWER & LIGHT COMPANY

PETITION FOR REMOVAL—Filed Feb. 14, 1957

[fol. 2] The petition of Louisiana Power & Light Company, a Florida corporation, defendant in the above entitled cause respectfully shows to the court that:

1.

A civil action has been commenced and is now pending in the 17th Judicial District Court for the Parish of Lafourche in the State of Louisiana, wherein the City of Thibodaux is plaintiff and petitioner is defendant, which action is designated by general number 12251, and is hereafter sometimes referred to as "Action No. 12251."

2.

Action No. 12251 is a civil action of which the United States District Court have original jurisdiction.

3.

This action involves a controversy which is wholly between citizens of different states in that the City of Thibodaux, plaintiff, was at the time of commencement of said action, and still is, a citizen of the State of Louisiana, and that petitioner, Louisiana Power & Light Company, the defendant in said action, was at the time of commence-

ment thereof and still is a corporation created and existing under the laws of the State of Florida, and was then and still is a resident and citizen of the said State of Florida, and not a resident and citizen of the State of Louisiana.

[fol. 3]

4.

The matter in controversy in said Action No. 12251, at the commencement of said action and at the present time exceeds the sum or value of $3,000.00, exclusive of interest and costs.

5.

Said Action No. 12251, was commenced on the 4th day of February, 1957, and process therein was served on petitioner on the 7th day of February, 1957, and less than twenty days have elapsed since said service, and the time to plead to said petition has not yet expired.

6.

Petitioner annexes hereto all documents served upon it in connection with this action.

7.

Petitioner herewith presents a good and sufficient bond conditioned that petitioner will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this case was not removeable or was improperly removed.

8.

Petitioner simultaneously with filing of this petition and accompanying bond, is giving written notice of the filing of this petition and the accompanying bond to plaintiff by depositing same in the United States mails addressed to Wollen J. Falgout, Thibodaux, Louisiana; Theo F. Cangelosi, Baton Rouge, Louisiana, and Louis Claiborne, New Orleans, Louisiana, attorneys for the plaintiff, a true copy [fol. 4] of which notice and certificate of service is attached hereto.

9.

Petitioner now expressly avers that it appears herein at this time through its counsel, especially and solely for the purpose of presenting this petition of removal, and for no other purpose, with full and complete reservation of all its rights in the premises.

Wherefore, petitioner prays that this Action No. 12251 may be removed from said State court into this Court for trial and determination; that this Court accept said bond and make and enter an order of removal of said Action No. 12251, and that a transcript of the record herein be made as provided by law, and the said record herein be removed to the said United States District Court, and that no other or further proceedings whatsoever be had in this suit in the said 17th Judicial District Court for the Parish of Lafourche, State of Louisiana.

Dated: February 14, 1957.

Harvey Peltier, Donald Peltier, Monroe & Lemann, J. Raburn Monroe, Melvin I. Schwartzman, Andrew P. Carter, By s/ Andrew P. Carter.

Proceedings in the 17th Judicial District, Parish of Lafourche, State of Louisiana

STATE OF LOUISIANA

17th Judicial District Court

SITTING IN AND FOR THE PARISH OF LAFOURCHE

Served on me at 11:30 A.M.
February 7, 1957
J. Raburn Monroe

No. 12251

[fol. 5] City of Thibodaux

vs.

Louisiana Power and Light Company

To: Louisiana Power and Light Company, through J. Blanc Monroe or J. Raburn Monroe, c/o of Monroe & Lemann, Attorneys at Law, New Orleans Louisiana Lemann, Attorneys at Law, New Orleans, Louisiana residing in the Parish of Orleans, State of Louisiana.

You are hereby summoned to comply with the prayer of the petition, a true and faithful copy whereof accompanies this citation, or file your answer thereto in writing with the Clerk of said Court at his office in the City of Thibodaux, ten days after the service hereof, adding one day for every ten miles your residence is distant from the place of holding said Court in the City of Thibodaux. Provided, the delay in no case shall exceed fifteen days in all.

Witness Honorable J. Louis Watkins, and Honorable P. Davis Martinez, Judges of said Court, granted under the impress of the seal of said Court and my official signature this the 4th day of the month of February, 1957.

s/ A. H. Landry, Clerk

Feb. 4, 1957
s/ A. H. Landry

17TH JUDICIAL DISTRICT
PARISH OF LAFOURCHE
STATE OF LOUISIANA
DIVISION

No. 12251

City of Thibodaux

vs.

Louisiana Power and Light Company

[fol. 6] PETITION FOR EXPROPRIATION

To the Honorable the Seventeenth Judicial District Court Sitting in and for the Parish of Lafourche, State of Louisiana.

The petition of the City of Thibodaux, a duly incorporated municipality of the State of Louisiana, appearing herein through Leonard J. Toups, its Mayor, with respect represents:

1.

That the Board of Trustees of the City of Thibodaux by resolution dated November 27, 1956, (marked Exhibit "C" for identification), authorized Leonard J. Toups, Mayor to file this suit, a certified copy of said resolution being attached hereto and made a part hereof as fully as though written herein in extenso.

2.

Louisiana Power and Light Company, defendant, is a foreign corporation organized under the laws of the State of Florida and authorized to do and doing business in the State of Louisiana and the Parish of Lafourche.

3.

Petitioner owns and operates an electric, gas and water distribution system within its city limits.

4.

Defendant owns and operates an electric distribution system serving customers in the portion of the City of Thibodaux indicated in red crayon on the attached map of the city (marked Exhibit "B" for identification), which [fol. 7] map is attached hereto and made a part hereof.

5.

Petitioner is presently serving the area indicated in red crayon on the map (marked Exhibit "B") with water and gas and desires to extend its electric distribution system

to service the said area so as to have an integrated utility system for the city.

6.

Petitioner desires to expropriate all of defendant's electrical distribution system located within the corporate limits of the City of Thibodaux as described in the detailed statement of property (marked Exhibit "A"), together with any and all rights or privileges the defendant may have to operate the same within the said city, a copy of said statement being attached hereto and made a part hereof as fully as though written herein in extenso.

7.

The Board of Directors of the City of Thibodaux have formerly adopted a resolution dated November 27, 1956, declaring it necessary for the public interest to expropriate the property, rights and privileges of defendant described in Paragraph 6 hereof, which resolution is marked Exhibit "C" for identification.

8.

Petitioner avers that the expropriation of the property, rights and privileges of defendant described in Paragraph 6 hereof is necessary and in the public interest.

[fol. 8]

9.

Petitioner through its Mayor, Board of Trustees, and City Attorney, has met with the defendant for the purpose of entering into an amicable agreement with said defendant for the purpose of acquiring the property herein sought to be expropriated, and has tendered to defendant the true value of the said property, namely the sum of Ninety-nine Thousand Two Hundred Twenty-four and no/100 ($98,224.00) (sic) Dollars, but defendant has refused to negotiate for the sale of the said property and has declined the said tender.

10.

Petitioner avers that the property herein sought to be expropriated should be adjudged to petitioner upon pay-

ment to defendants of the value thereof plus all damages sustained in consequence of the expropriation.

11.

Petitioner avers that the Court should appoint six commissioners, property owners and residents of the Parish of Lafourche, who should carefully examine the property herein sought to be expropriated and said commissioners should make a detailed appraisal of its value, showing a separate valuation of the land, the buildings, the machinery and other property sought to be expropriated, and thereafter file their report to this Court of their investigation and estimate of evaluation, within fifteen days after notification to them by the Clerk of their appointment.

Wherefore, petitioner prays that defendant be duly cited [fol. 9] to answer this petition, that it be served with a copy hereof through its proper officer, that the Court appoint six commissioners, property owners and residents of the Parish of Lafourche, who will carefully examine the property sought to be expropriated and shall make a detailed appraisal of its value, showing a separate valuation of the land, buildings, the machinery and other property sought to be expropriated, and said commissioners shall make a report to this Court of their evaluation within fifteen days after notification to them by the Clerk of their appointment; that in due course and pursuant to the provisions of the law there be judgment herein in favor of the petitioner, City of Thibodaux, and against the defendant, Louisiana Power and Light Company, adjudging your petitioner the property herein sought to be appropriated upon payment to defendant the value thereof in accordance with law.

Petitioner further prays for all costs and for all general and equitable relief.

City of Thibodaux, s/ Leonard J. Toups, Mayor, s/ Kenneth Hoffman, Commissioner, s/ Bert Hebert, Commissioner, s/ Wollen J. Falgout, City Attorney, 405 West Second St., Thidobaux, Louisiana, s/ Theo F. Cangelosi, Special Attorney, 612 North Boulevard, Baton Rouge, Louisiana,

[fol. 10] s/ Louis Claiborne, Special Attorney, 608 Hibernia Bank Building, New Orleans, Louisiana.

Serve defendant through:

J. Blanc Monroe or J. Raburn Monroe
Monroe & Lemann
Attorneys at Law
New Orleans, Louisiana

Filed
Feb. 4, 1957
A. H. Landry

State of Louisiana
Parish of Lafourche

Before Me, the undersigned authority, personally came and appeared, Leonard J. Toups, Mayor, Kenneth Hoffman, and Bert Hebert, Commissioners, who, after being duly sworn, deposes and say:

That they are the Mayor and Commissioners, respectively, of the City of Thibodaux, petitioner in the above and foregoing suit and that the facts and allegations contained in the above and foregoing petition are true and correct.

s/ Leonard J. Toups, s/ Kenneth Hoffman, s/ Bert Hebert.

Sworn To And Subscribed before me this 2nd day of February, 1957.

---

s/ Wollen J. Falgout, Notary Public.

17TH JUDICIAL DISTRICT COURT
PARISH OF LAFOURCHE
STATE OF LOUISIANA
DIVISION

No. 12251

City of Thibodaux

VS.

Louisiana Power and Light Company

[fol. 11] ORDER

Considering the verified pleadings herein and the law applicable in such cases,

It Is Hereby Ordered That:

1. Clyde Naquin
2. Edward McNamara
3. William Herpel
4. Albert Oliver
5. George Diedrich
6. David Parker

resident property owners of the Parish of Lafourche, Louisiana, be and they are hereby appointed commissioners to carefully examine the property sought to be expropriated herein, and make a detailed appraisal of its value and report their findings to the Court as provided by law.

It Is Further Ordered that the Clerk of Court for the Parish of Lafourche, Louisiana, notify the above commissioners of their appointment as provided by law.

It Is Further Ordered that said commissioners before beginning the performance of their duties take the oath to the faithful and impartial discharge of their duties.

Order Granted and Signed at Thibodaux, Parish of Lafourche, Louisiana, this 4th day of February, 1957.

s/ P. Davis Martinez, Judge, 17th Judicial District Court.

Filed
Feb. 4, 1957
s/ A. H. Landry

[fol. 12] REMOVAL BOND.

(Number and title omitted). (Filed: February 14, 1957)

Know All Men By These Presents That Louisiana Power & Light Company, defendant in the above numbered and entitled cause, as principal, and the New Amsterdam Casualty Co., as surety, are formally bonded unto the City of Thibodaux, plaintiff in the above numbered and entitled cause, its successors and assigns in the penal sum of Five Hundred Dollars lawful money of the United States of America, for the payment of which well and duly to be made, we bind ourselves, our successors, and assigns.

Whereas the said Louisiana Power & Light Company has applied by petition to the United States District Court, Eastern District of Louisiana, New Orleans Division, for the removal of the above entitled and numbered cause from the 17th Judicial District Court for the Parish of Lafourche, State of Louisiana, to the District Court of the United States, Eastern District of Louisiana, New Orleans Division.

Now The Undersigned will pay all costs and disbursements incurred by reason of the removal proceedings within the above penal amount hereof should it be determined that the case was not removeable or was improperly removed; otherwise, this obligation shall be null and void.

Dated This 14th Day of February, 1957.

Louisiana Power & Light Company, Principal, New Amsterdam Casualty Co., Surety.

[fol. 13] ORDER APPROVING REMOVAL BOND

(Number and title omitted) (Filed: February 14, 1957)

The removal bond filed by Louisiana Power & Light Company, petitioner in the foregoing petition for removal in the amount of Five Hundred Dollars is hereby approved.

New Orleans, Louisiana, this 15th day of February, 1957.

s/ J. Skelly Wright

IN THE UNITED STATES DISTRICT COURT

ANSWER—Filed February 19, 1957

The answer of Louisiana Power & Light Company, defendant in the above entitled action, which has been removed from the 17th Judicial District Court in and for the Parish of Lafourche, Louisiana, with respect shows:

I.

Answering Paragraph 1 of the petition, defendant denies that the alleged resolution of the Board of Trustees of the City of Thibodaux, dated November 27, 1956, is legal or valid, and denies that the said alleged resolution authorizes the action taken by the Board of Trustees.

II.

Answering Paragraph 2 of the petition, defendant admits the allegations thereof.

III.

Answering Paragraph 3 of the petition, defendant admits the allegations thereof.

[fol. 14]

IV.

Answering Paragraph 4, defendant admits that it owns and operates electric distribution facilities serving customers in the portion of the City of Thibodaux indicated in red crayon on the map, Exhibit B, attached to the petition, without admitting that its service area within the said City limits is limited to said area so marked on said map.

V.

Answering the allegations of Paragraph 5, defendant denies the same for lack of information sufficient to form a belief as to the truth of said allegation.

VI.

Paragraph 6 of the petition simply sets forth petitioner's desires, as to which defendant has no information sufficient to form a belief. Defendant, however, does allege that the description of the property which plaintiff states it desires to expropriate is not adequate for full identification.

VII.

Answering Paragraph 7, defendant denies the allegations thereof and, on the contrary, alleges that the aforesaid resolution did not declare that this proposed expropriation was necessary for the public interest or that said resolution properly authorized this proceeding.

VIII.

Defendant denies the allegations of Paragraph 8 and, on the contrary, declares that the proposed expropriation is neither necessary nor in the public interest.

[fol. 15]

IX.

Answering Paragraph 9, defendant admits that it has met with the Mayor, Board of Trustees and the City Attorney, but denies that the true value of defendant's property sought to be acquired is $99,224.00, but on the contrary alleges that it is greatly in excess of that figure; defendant further denies that any sum of money was tendered to it or declined by it, or that it has refused to negotiate.

X.

Answering Paragraph 10, defendant denies the allegations thereof.

XI.

Answering Paragraph 11, defendant denies the allegations thereof.

XII.

Further answering plaintiff's petition herein, defendant alleges that it was granted a franchise by the Parish of Lafourche in the year 1927, granting it the right to extend electric service to customers in the areas referred to in the petition; that it has also succeeded to the franchise rights granted by the Parish of Lafourche to the Lockport Power & Light Company by that Ordinance of the Police Jury of Lafourche Parish dated April 14, 1926, as well as to those franchise rights granted to J. C. Bertrand by Ordinance of said Police Jury dated the 8th day of June, 1927. That in reliance on such rights, defendant has constructed generating capacity, transmission lines, substa- [fol. 16] tions, distribution lines and other property to render service to residents and customers in the area referred to in plaintiff's petition; that the said granting of franchise rights, followed by the exercise thereof by defendant by the construction of the properties aforesaid in reliance thereon, constitutes a valid, binding contract between defendant and the Parish of Lafourche. Defendant alleges that if R.S. 19:101 et seq., the purported resolution of the Board of Trustees of the City of Thibodaux dated November 27, 1956, or any other statute, ordinance or resolution, were construed, or if any provision of the Charter of the City of Thibodaux, being Act 266 of the Louisiana Legislature of 1918, and particularly Sections 1 and 2 thereof, as amended and reenacted by Acts Nos. 84 of 1942 and 300 of 1948, or R.S. 33:171 et seq., insofar as the same may be held to extend or to authorize the extension of the limits of the City of Thibodaux subsequent to the date of defendant's contract of franchise so as to include the area wherein is located defendant's property sought to be expropriated, were construed, to authorize the City of Thibodaux to deprive defendant of its right to continue to render electric service in the area referred to in the petition by expropriation of its facilities and its

franchises, such construction would render such statutes or ordinances unconstitutional as an impairment of the obligation of contract, in violation of Section 10, Article I of the Constitution of the United States, and would also constitute a taking of defendant's property without due process of law, in violation of Article I, Section 2 of the [fol. 17] Constitution of Louisiana, and of the 14th Amendment to the Constitution of the United States.

XIII.

Under date of February 12, 1947, defendant entered into a written contract with the City of Thibodaux, pursuant to which, in consideration of the transfer of certain of defendant's customers to service by the City of Thibodaux, the latter City recognized defendant's rights to render electric service in the area described in the petition and specifically contracted and agreed that defendant could continue such service to customers in this area. That if said R.S. 19:101, et seq., the aforesaid resolution of the Board of Trustees of the City of Thibodaux, or any other statute or ordinance, should be construed, or if any provision of the Charter of the City of Thibodaux, being Act 266 of the Louisiana Legislature of 1918, and particularly Sections 1 and 2 thereof, as amended and reenacted by Acts Nos. 84 of 1942 and 300 of 1948, or R.S. 33:171 et seq., insofar as the same may be held to extend or to authorize the extension of the limits of the City of Thibodaux subsequent to the date of defendant's contract of franchise so as to include the area wherein is located the defendant's property sought to be expropriated, should be construed, to deprive defendant of its right to continue service to such customers in said area through expropriation of its facilities and franchises, there would be an impairment of the obligation of said contract with the City, in violation of Section 10, Article I [fol. 18] of the Constitution of the United States, and such construction would constitute a taking of property without due process of law, in violation of Article I, Section 2 of the Constitution of Louisiana, and of the 14th Amendment to the Constitution of the United States.

XIV.

Answering alternatively, with full reservation of the above defenses, the attempt by the City of Thibodaux, without authority, to expropriate "any and all rights or privileges the defendant may have to operate the same within the said city" is further illegal as violative of the provisions contained in Section 14 of Article 19 of the Constitution of Louisiana, and in derogation of the obligation imposed on the Legislature of Louisiana by Section 5 of Article 13 of said Constitution.

XV.

Further answering alternatively, with full reservation of the above defenses, defendant alleges that the proposed expropriation of defendant's property by the City of Thibodaux is illegal in that it is contrary to the specific requirement of the laws of Louisiana that a certificate of public convenience and necessity from the Louisiana Public Service Commission must be first obtained, and in violation of the order of the Louisiana Public Service Commission, dated June 16, 1953, prohibiting any utility to transfer any of its properties without first obtaining the consent of the Louisiana Public Service Commission.

[fol. 19]

XVI.

Further answering alternatively, with full reservation of the above defenses, defendant alleges that even if the said R.S. 19:101 et seq. were construed to be constitutional as applied to the present attempt by plaintiff to expropriate defendant's properties, the attempt to expropriate "any and all rights or privileges the defendant may have to operate the same within the said city" is without authority even in said statute, and therefore such attempt is unauthorized and should be denied.

XVII.

Further answering alternatively, with full reservation of the above defenses, defendant alleges that there has been no finding by the City of Thibodaux that it is necessary to

expropriate the properties of Louisiana Power & Light Company, and alleges that it is in fact not necessary for the City to expropriate the same.

XVIII.

Further answering alternatively, with full reservation of the above defenses, defendant alleges that the property of defendant sought to be expropriated by the City of Thibodaux consists in large part of movable property, intangible property, and incorporeal rights, which are not the subject of expropriation under the laws of Louisiana.

XIX.

Further answering alternatively, with full reservation of the above defenses, defendant alleges that it has installed [fol. 20] generating capacity, transmission capacity, substation capacity distribution lines and other property outside of the area referred to in the petition, which facilities are necessary to render the electric service to the area in question and which defendant would not have constructed and installed except for such service to such area. Should the property here sought to be expropriated be taken from defendant, it would be entitled to compensation in the form of severance damages for these properties outside of the limits of the area in question, constructed and installed for the purpose of serving this area. Defendant would be fully entitled to this and to damages for necessary relocation of transmission and distribution lines to serve other customers, to damages for loss on idle plant facilities, to damages for loss of "going value," to damages for loss on idle capital funds, and for other severance damages. Never at any time has the City of Thibodaux offered to compensate defendant for these damages, and apparently does not propose to do so in its petition, as shown by the prayer and Exhibit A attached thereto.

XX.

Further answering alternatively, with full reservation of the above defenses, defendant alleges on information and

belief that in the year 1954 the City of Thibodaux proposed to incorporate within its corporate limits some of the areas shown in Exhibit B to the petition, marked in red. At the time this proposal was being considered, and before final action thereon, defendant is informed and believes, the [fol. 21] Mayor and Trustees of the City of Thibodaux gave assurance that if these areas were incorporated within the corporate limits, that defendant would continue to render service to the newly incorporated areas. In reliance on these assurances, no opposition was filed to the incorporation and defendant constructed further distribution facilities in the area in question. This action constituted a reaffirmation of defendant's contract rights as above set out, and any construction of R.S. 19:101 et seq., Act 266 of 1918 as amended by Acts 84 of 1942 and 300 of 1948, R.S. 33:171 et seq., or any statute or ordinance to permit the impairment of these contracts would be violative of Section 10 of Article I of the Constitution of the United States, and would constitute the taking of property without due process of law, in violation of the sections of the Constitutions of Louisiana and the United States above mentioned.

XXI.

Further answering alternatively, with full reservation of the above defenses, defendant alleges that R.S. 19:101 et seq., which provides for the appraisal of property to be expropriated by six Commissioners, makes no provision that said Commissioners should be in any way qualified or impartial, and sets no standards for said appointment, and defendant further alleges on information and belief that the Commissioners herein were chosen without consideration of their qualifications or impartiality and without any consultation with the defendant. Defendant further alleges that R.S. 19:101 et seq. makes no provision for per- [fol. 22] mitting it to present evidence to such Commissioners, to have any hearing before such Commissioners, to cross-examine witnesses or to contradict such evidence such commissioners may consider in making their report. Defendant alleges, therefore, that for this and other reasons, R.S. 19:101 et seq. does not provide a fair and

equitable procedure, nor a procedure which constitutes due process of law, and that therefore any expropriation of defendant's property pursuant thereto would be taking of its property without due process of law, in violation of the articles of the Louisiana and United States Constitutions above referred to.

XXII.

Further answering alternatively, with full reservation of the above defenses, defendant alleges that R.S. 19:101 et seq., if valid as applied to this case, only authorizes the expropriation of an "electric light . . . plant or property" and nowhere authorizes the expropriation of a part or portion of a "plant or property" or a system. On the contrary, the statute requires that where the same person is the owner of more than one kind of plant, such as gas, or water plants, no expropriation can be made unless all plants are expropriated. To avail itself of the statute, plaintiff must expropriate all of defendant's plants and not part of the electric plant.

Wherefore, defendant prays judgment that the complaint of the plaintiff herein be dismissed with costs to the defendant.

[fol. 23] Dated: February 19, 1957.

Harvey Peltier, Donald Peltier, Monroe & Lemann, J. Raburn Monroe, Andrew P. Carter, By s/ Andrew P. Carter, 1424 Whitney Building, New Orleans 12, Louisiana.

Pre-Trial Conference of May 15, 1957

IN THE UNITED STATES DISTRICT COURT

Wright, J:

Pretrial conference was this day held.

APPEARANCES

Present: Wollen J. Falgout, Esq.,
Theo F. Cangelosi, Esq.,
Louis Claiborne, Esq.,
Attorneys for Plaintiff

Donald Peltier, Esq.,
Melvin Schwartzman, Esq.,
Andrew P. Carter, Esq.,
J. R. Monroe, Esq.,
Attorneys for defendant.

STIPULATION OF COUNSEL

It was stipulated between counsel that the seizure under Rule 71 (a), F.R.Civ. P., will be used and that a commission of three will be appointed to assess value, provided that issue is reached.

It is further agreed that all of the defenses outlined in the defendant's answer be and they are hereby set for hearing on Wednesday, June 12, 1957, at 10:00 A.M. Defendant's memorandum will be filed on June 3, 1957, and the plaintiff's on June 10, 1957. Defendant may file reply memoranda by June 12, 1957.

J.S.W.

[fol. 24]

IN THE UNITED STATES DISTRICT COURT

HEARING ON ALL DEFENSES IN DEFENDANT'S ANSWER AND SUBMISSION—June 12, 1957

Wright, J:

This cause came on this day to be heard on all defenses in defendant's answer.

Present: Theo F. Cangelosi, Esq.,
Attorney for Plaintiff

Andrew P. Carter, Esq.,
J. Raburn Monroe, Esq.,
Melvin Schwartzmann, Esq.,
Attorneys for Defendant

Argument:

The matter was submitted when the Court took time to consider.

J.S.W.

IN THE UNITED STATES DISTRICT COURT

AFFIDAVIT OF W. O. TURNER—Filed June 12, 1957

State of Louisiana
Parish of Orleans

Before Me, the undersigned authority, personally came and appeared: W. O. Turner, who declared to me, Notary, under oath that: He is President of the Louisiana Power & Light Company, which was incorporated under the laws of Florida on June 25, 1927, for the purpose, among others, of integrating the operation of the electric properties of several predecessor companies. It proceeded to accomplish this integration by the construction of an 110 KV transmission grid so as to permit it to make large central sta-
[fol. 25] tion service available to all of the communities and rural areas which it served. Attached hereto is a man showing this transmission system. The Company generates electricity at its Sterlington Generating Station in Ouachita

Parish, and at its Nine Mile Point Generating Station in Jefferson Parish, and practically all of the Company's electric customers receive electric energy generated at one or the other of these two central points. The Company's Northern service areas are interconnected with its Southern service areas through the transmission lines of Mississippi Power & Light Company, a sister company, and through the lines of Gulf States Utilities Co. and Central Louisiana Electric Co., Inc.

As stated above, Louisiana Power & Light Company generates electricity in modern, efficient steam electric generating stations, transmits this energy over high voltage lines to substations located at various load centers. At such substations, the voltage is reduced and the power distributed throughout the area to large individual customers or to groups of residential customers, where the voltage is again reduced to that required for lights, motors, and other uses of the various customers.

The Company's Sterlington Generating Station includes five generators totalling 146,000 Kilowatt capacity. The Nine Mile Point Generating Station includes three generators totalling 319,000 kilowatt capacity. There is presently being installed at Sterlington a sixth unit, having a capacity of 210,000 Kilowatts. The Company is planning a new [fol. 26] power plant at Littly (sic) Gypsy on the Mississippi River near Reserve, and is planning an initial unit with a capacity of 200,000 or more kilowatts. Today, approximately three and a half years transpire from the time that plans for a new unit are initiated until the unit itself is put into operation, and thereafter, at the present rate of growth, it takes approximately three years before such unit is fully loaded and additional capacity is required.

With respect to transmission lines, the Company must also act well in advance, since, depending upon the length of the line, it will require a year or more to secure the required rights of way before high tension transmission lines can be built. It also takes close to a year to design such a line, purchase the material, receive delivery, and erect it. When the high tension transmission line is constructed, it has to be of sufficient capacity to take care of future growth, which means that some lines may not be

fully loaded for as long as six or more years. Similarly, transmission substations located at the generating station must be large enough to handle the entire output of the station.

Distribution facilities including 13,800 volt lines usually take from three to six months to construct. The capacity of such lines depends upon the projected future growth of the area to which they bring service. Normally, the Company builds 13,800 volt distribution lines up to a distance of twenty miles or more if necessary to bring service to an area.

Normally, when such transmission and distribution lines [fol. 27] up to a distance of twenty miles or more if necessary to bring service to an area (sic).

Normally, when such transmission and distribution lines are first built, there is not, during the first several years, enough business to pay for the annual cost of operation of the line.

A reference to the map attached hereto shows that the Company serves no large city. Starting from such small communities as Algiers, Gretna and West Monroe, the Company extended its lines into rural areas and other small communities in the belief that, with the future growth of these areas, these lines would pay for themselves.

On July 26, 1929, the Company authorized the extension of a 13,800 volt line from Labadieville via Thibodaux to two miles beyond Shriever, as well as an extension towards Lafourche Crossing, a total distance of approximately eighteen miles, at a cost of $44,544.37. It was estimated that the Company had a loss of about $4,000 for the first year this line extension was in operation. With the ensuing depression, new business was added to this line very slowly. During the ensuing years, the Company continued to make line extension in the Thibodaux area in advance of the development of the territory, and recently completed a new 115,000 volt substation immediately North of Thibodaux, at a cost in excess of $200,000, to increase the amount of power available in the area, purposes in part for better service to the customers served by the property which the City of Thibodaux here seeks to expropriate. In summary, the Company has taken some twenty-eight years to build

[fol. 28] up the load in and around Thibodaux, at considerable expense, not only in invested capital but in promotional expense calculated to increase the use of electricity. The property sought to be taken here by the City of Thibodaux represents the portion of the Company's property in this area with the greatest customer density, and consequently represents the heart of the Company's existing system in this area.

On the 9th day of February, 1927, the Police Jury of the Parish of Lafourche granted to Louisiana Power and Light Company, by Ordinance No. 534, a Parishwide franchise. Louisiana Power & Light Company, on April 4, 1927, changed its name to Louisiana Electric Service Corporation, and on August 1, 1927, transferred this franchise, together with other properties, to Louisiana Power & Light Company, the present defendant. In reliance on this franchise, Louisiana Power & Light Company immediately started the construction of its distribution system in Lafourche Parish and, as set out above, in 1929 extended its 13,800 volt distribution system through the Thibodaux area.

The Police Jury of the Parish of Lafourche, on the 8th day of June, 1927, also granted a franchise to J. C. Bertrand, identified as Ordinance 536. This franchise was transferred by J. C. Bertrand to Lockport Light & Power Company. The Lockport Light & Power Company had previously acquired a limited franchise, covering Wards 3, 4, 7, 8, 9 and 10, from the Police Jury of Lafourche Parish, under date of April 14, 1925. Both of these franchises were transferred by Lockport Light & Power Company to Louisiana Public Service Corporation, on the 1st day of January, [fol. 29] 1935, together with certain other properties, but not, however, until said Lockpoert (sic) Light & Power Company had constructed electric properties in Lafourche Parish in reliance on said ordinances.

Under date of July 31, 1942, Louisiana Public Service Corporation transferred the aforesaid two franchises, together with related property in Lafourche Parish, to Louisiana Power & Light Company. Louisiana Power & Light Company has since that date continued to construct distribution property in Lafourche Parish in reliance on these three franchises.

Since 1927, the City of Thibodaux has, on a number of occasions, changed its city limits, taking in additional territory. As a result, in 1947 the Company was rendering electric service to the Coca Cola Company, which was within the then limits of the City of Thibodaux. The City of Thibodaux desired to serve this industrial customer, and also desired to serve this industrial customer, and also desired to serve the proposed Nicholls Junior College to be located immediately outside the city limits. Discussions were held between the Mayor and Commissioners and defendant, as a result of which a contract was entered into between the City of Thibodaux and the defendant, under which defendant agreed to transfer the Coca Cola Company from its service to that of the City, and to give the service to the proposed Nicholls Junior College to the City, all in consideration of the City's agreement that any and all existing or future users of electric service "without the presently established city limits" and within the service area of [fol. 30] Louisiana Power & Light Company, should be served by Louisiana Power & Light Company. This is the same Louisiana Coca Cola Bottling Company which is referred to by the City of Thibodaux in its Prospectus for the sale of bonds, dated Thursday, July 12, 1956 (Page 27) as one of the ten leading taxpayers of the City of Thibodaux, and presumably one of the most desirable industrial customers.

The electric rates charged for electric service by the City of Thibodaux are approximately 58.5% higher than those charged by Louisiana Power & Light Company for residential consumers, and approximately 14.2% higher for commercial consumers. As a municipal operation, the minicipal (sic) electric plant pays no ad valorem taxes, no excise taxes, and no State or Federal income taxes. Despite the fact that its cost of service is probably higher than that of Louisiana Power & Light Company because of its operation of smaller and less efficient generating units, affiant is informed and believes that the City makes a considerable profit on its electric operation. This profit is used in its other municipal operations, so that the high rates charged to the electric consumers are in effect a form of taxation.

In 1954, the Council of the City of Thibodaux proposed to extend its limits so as to incorporate within its corporate limits most of the areas served by Louisiana Power & Light Company with the facilities sought here to be expropriated. Affiant is informed and believes that at that time, the residents of that area, fearful that their rates [fol. 31] would be increased as a result of the extension of the city limits, met with the Council in public meeting and were assured categorically and openly that no change would be made in the electric service they were receiving as a result of the proposed incorporation. As a result of such assurance, no objection was lodged to the proposal and no proceedings instituted to stop the incorporation.

Upon the filing of this proceeding in the State District Court in Thibodaux, affiant is informed and believes that a petition was filed with the Louisiana Public Service Commission; by the vast majority of the electric customers in the area affected by this proceeding, asking that Louisiana Power & Light Company be required to continue service to them in this area, at the same rate level as presently in existence. This matter is now pending before the Louisiana Public Service Commission.

s/ W. O. Turner

Sworn to and subscribed before me this 11 day of June, 1957.

s/ Bartholomew P. Sullivan, Jr., Notary Public.

(Seal)

[fol. 31-A]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

[Title omitted]

STIPULATION OF COUNSEL—June 12, 1957

As a result of the pre-trial conference held on May 15, 1957, in Judge Skelly Wright's Chambers, and as a result of a conference between counsel following immediately thereafter, the following matters were and are agreed to between counsel for the City of Thibodaux, plaintiff, and counsel for Louisiana Power & Light Company, defendant:

(1) It is agreed that the procedure to be followed in the trial and conduct of this case shall be that provided by Section 71A of the Federal Rules of Civil Procedure, and neither counsel shall make objection hereafter to the following of the procedure prescribed therein.

(2) It is agreed that Ordinance No. 522, dated April 14, 1926, Ordinance No. 534, dated February 9, 1927, and Ordinance No. 536, dated June 8, 1927, of the Police Jury of Lafourche Parish, photostatic copies of which are attached hereto, are duly adopted ordinances of the said Police Jury, that the said ordinances remain in full force and effect, that Louisiana Power & Light Company has duly succeeded to the rights granted to Lockport Light & Power Company, Inc. in Ordinance No. 522 above mentioned, and that Louisiana Power & Light Company has duly succeeded to the rights granted to J. C. Bertrand in Ordinance No. 536 above mentioned.

(3) That "Memorandum of Agreement between the Town of Thibodaux and Louisiana Power & Light Company", photostatic copy of which is attached hereto, accompanied by Louisiana Power & Light Company drawing No. B-6-1232, is a true and correct copy of the agreement executed on behalf of the Town of Thibodaux by Charles E. Delas, Henry P. Braud, and Noah Ducasse.

[fol. 31-B] (4) That the document attached hereto, entitled "Louisiana Public Service Commission General Order", is a true copy of the General Order of the Louisiana Public Service Commission adopted June 16, 1953, and is still in full force and effect.

(5) That counsel for the City of Thibodaux stipulate that the City does not have a Certificate of Public Convenience and Necessity, nor has obtained consent, from the Louisiana Public Service Commission, and has not applied for such a Certificate of Public Convenience and Necessity, or consent, from Louisiana Public Service Commission, for the acquisition and operation of the electric properties belonging to Louisiana Power & Light Company and located within the present city limits of Thibodaux.

(6) That in addition to the property sought to be expropriated by the City of Thibodaux in this proceeding, as described in the petition and the engineering report of Barnard and Burk, Louisiana Power & Light Company owns the following additional facilities located within the present city limits of Thibodaux:

The property described on Exhibit A attached hereto.

Dated: June 12, 1957

Monroe & Lemann, J. Raburn Monroe, Andrew P. Carter, Melvin L. Schwartzman, Dona[illegible] Peltier, Counsel for Defendant.

Counsel for Plaintiff

[fol. 31-C]

ORDINANCE NO. 522

AN ORDINANCE GRANTING A FRANCHISE OR RIGHT OR PRIVILEGE TO THE LOCKPORT LIGHT & POWER COMPANY, INC., ITS SUCCESSORS AND ASSIGNS, OVER THE PUBLIC RAILWAYS OR PUBLIC ROADS IN THE PARISH OF LAFOURCHE, LOUISIANA, IN WARDS 3, 4, 7, 8, 9 and [illegible] (NOT WITHIN THE LIMITS OF ANY INCORPORATED CITY, TOWN OR VILLAGE) FOR THE CONSTRUCTION, ERECTION, OPERATION AND MAINTENANCE OF LINES, POLES, WIRES, CONDUITS, AND APPURTENANCES, FOR THE TRANSMISSION OF ELECTRIC ENERGY AND ELECTRIC CURRENT FOR HEAT, LIGHT OR

POWER, OR OTHER PURPOSES FOR WHICH ELECTRICITY MAY BE USED, IN, OVER, UNDER, OR ALONG THE PUBLIC ROADS OR HIGHWAYS OF THE PARISH ABOVE DESIGNATED, WARDS 3, 4, 7, 8, 9 and 10, (NOT WITHIN THE LIMITS OF ANY INCORPORATED CITY, TOWN OR VILLAGE) AND FIXING THE TERMS, CONDITIONS, AND LIMITATIONS RELATIVE TO SAID FRANCHISE, RIGHT OR PRIVILEGE.

SECTION I: BE IT ORDAINED BY THE POLICE JURY OF THE PARISH OF LAFOURCHE, STATE OF LOUISIANA, IN SPECIAL SESSION LEGALLY CONVENED: That there is hereby granted to the Lockport Light & Power Company, Inc., a corporation organized and created under the laws of the State of Louisiana, domiciled at Morgan City, St. Mary Parish, Louisiana, its successors and assigns, the franchise and right and privilege over the public roads, or State Highways in said Parish and State, (not within the limits of any incorporated, City, Town or Village) and which said Public roads or State highways are hereinafter referred to and designated, for convenience, as "The Highways", for the erection, construction, maintenance and operation of lines, poles, wires, conduits and appurtenances for the transmission of electric energy and electric current for heat, light and power and other purposes for which electricity may be used, in, over, under or along said Highways, within the limits stated, in the Parish of Lafourche, State of Louisiana, not within the limits of any incorporated City, Town or Village.

SECTION II: BE IT FURTHER ORDAINED, ETC. That this grant and right shall be without effect without the written consent and approval of the Louisiana State Highway Engineer or the Louisiana State Highway Commission and that no work done in pursuance to and in exercise of this franchise on said Highways in the Parish of Lafourche, Louisiana, Wards 3, 4, 7, 8, 9 and 10, shall be done in a manner contrary to or in conflict with the requirements of the existing laws of the State of Louisiana in reference to Public highways and particularly of Act No. ..... of

.....

SECTION III: BE IT FURTHER ORDAINED, ETC.: That this franchise, right and privilege is granted subject to the supervision of the Police Jury of Lafourche Parish and the

Louisiana Highway Engineer and under the following terms, stipulations and conditions:

(a) That before any of the electric transmission poles or power lines herein and hereby authorized are constructed the plans and specifications therefor shall be submitted to and approved by the Louisiana State Highway Engineer.

(b) That all poles, wires, and other necessary fixtures and appurtenances shall be erected under the supervision of the State Highway Engineer and subject to his approval, and that if said Highways should be disturbed or damaged in the erection, construction or maintenance of any work [fol. 31-D] done under this franchise then the same shall be promptly replaced and repaired by the Grantee herein, its successors and assigns, at their expense, to the satisfaction of the State Highway Engineer.

(c) That, in the erection, construction, and maintenance of any work done under this franchise, no trees along said highways shall be cut or trimmed without first obtaining the consent of the adjoining land owner, upon whose property said trees may be situated.

(d) That the said Grantee, its successors and assigns, shall whenever it becomes necessary, remove or change the location of any of said poles or lines for the purpose of highway improvements, which it is requested to do by the Police Jury of the Parish of Lafourche, or the Louisiana State Highway Engineer or the Louisiana Highway Commission, without any expense to either of said bodies; and that in case the said Grantee, its successors and assigns, should at any time desire to abandon said electric transmission lines and remove the same from the State Highway, then, and in that event, it shall repair all damage done to said highways by said abandonment or removal at its own expense.

(e) That the said Grantee, its successors and assigns, shall indemnify, protect, hold and save harmless the Parish of Lafourche and the Louisiana Highway Commission from any and all loss, damages or expenses which it or they may suffer or in any way be rendered subject to on account of this grant and franchise.

SECTION IV: BE IT FURTHER ORDAINED, ETC.: That this ordinance and franchise shall have full force and effect from and after its adoption.

SECTION V: BE IT FURTHER ORDAINED, ETC.: That all ordinances or parts of ordinances contrary to or in conflict with the provisions of this ordinance, be and the same are hereby repealed.

THUS DONE, READ, ADOPTED, AND SIGNED AND SEAL AFFIXED in open session at Thibodaux, Lafourche Parish, La., on this 14th, day of April, 1926.

/s/ LEON Z. BOUDREAUX
Pres. Police Jury of Lafourche Parish

ATTEST:

/s/ CHAS. J. CONLON
Secretary.

I have read the above ordinance and consent to its adoption by the Police Jury of Lafourche Parish.

/s/ W. B. ROBERT
Louisiana State Highway Engineer

March 9, 1926

[fol. 31-E]

ORDINANCE NO. 534

An Ordinance granting a franchise to the Louisiana Power and Light Company for the construction, maintenance, and operation of electric light, heat and power plants and system in the *Parish of Lafourche.*

SECTION 1:—Be it ordained by the Police Jury of the Parish of Lafourche in regular and lawful session convened that the Louisiana Power and Light Company, its successors and assigns, is hereby accorded and granted for the period of Ninety-nine years from date of adoption hereof, the right, power and authority to construct, maintain and operate in, over and through the Parish of Lafourche, and in, over, under and along all public roads, streets and alleys therein not within the limits of any in-

corporated city, Town or Village, lines or poles, wires, conductors, conduits, and cables for the transmission of electric current for heat, light, power and other purposes, in said Parish, including the right, power and authority to cross Bayou Lafourche, and over water courses within the limits of said Parish in so far as such authority may be granted hereby; and to do all things and construct and operate all such plants and stations as may be or become necessary or expedient to carry out said object and purposes, subject to the limitations and conditions contained in this Ordinance.

SECTION 2:—Be it further ordained, etc., that the grantee its successors and assigns, shall not construct any work in, over, under and along any State Highway in said Parish, without first having secured the consent of the State Highway Engineer, and no work done on a State Highway in pursuance and exercise of this franchise shall be done in a manner contrary to or in conflict with the requirements of the existing laws of the State of Louisiana in reference to public highways, and particularly of Act No. 95 of 1921.

SECTION 3:—Be it further ordained, etc., that when the grantee, its successors and assigns, construct any work in, over, under or along any public roads, streets and alleys in said Parish, not constituting a part of the State Highway System, it shall at its own expense, replace said Public Road, Street or Alley in as good a condition as it was previous to such construction.

SECTION 4:—Be it further ordained, etc., that the said grantee shall exercise its rights under the franchise herein granted within a period of Two years from the date of the adoption of this Ordinance, otherwise the franchise herein granted shall become null and void.

SECTION 5:—Be it further ordained, etc., that the said grantee, its successors and assigns, shall, whenever it becomes necessary, remove or change the location of any of its poles or lines, for the purpose of highway improvements, when requested so to do by this Police Jury, or the State Highway Engineer, or the Louisiana Highway Commission, without any expense to either of said bodies.

STATE OF LOUISIANA
PARISH OF LAFOURCHE

I, the undersigned Clerk of the Police Jury of the Parish of Lafourche, State of Louisiana, do hereby certify, that the above and foregoing is a true and correct copy from the Original Ordinance, adopted by the said Police Jury of the Parish of Lafourche, on the Ninth day of February, 1927.

In Testimony whereof, witness my official signature hereunto affixed, duly authenticated with the impress of the seal of the Police Jury of the Parish of Lafourche, at Thibodaux, Louisiana, this Ninth day of February, 1927.

/s/ CHAS. J. CONLON
Clerk of the Police Jury,
Parish of Lafourche;
State of Louisiana.

[fol. 31-F]

ORDINANCE No. 536

AN ORDINANCE GRANTING A FRANCHISE OR RIGHT OR PRIVILEGE TO J. C. BERTRAND, HIS HEIRS AND ASSIGNS, OVER THE PUBLIC HIGHWAYS OR PUBLIC ROADS IN THE PARISH OF LAFOURCHE, LOUISIANA, (NOT WITHIN THE LIMITS OF ANY INCORPORATED CITY, TOWN OR VILLAGE) FOR THE CONSTRUCTION, ERECTION, OPERATION AND MAINTENANCE OF LINES, POLES, WIRES, CONDUITS, AND APPURTENANCES, FOR THE TRANSMISSION OF ELECTRIC ENERGY AND ELECTRIC CURRENT FOR HEAT, LIGHT OR POWER, OR OTHER PURPOSES FOR WHICH ELECTRICITY MAY BE USED, IN, OVER, UNDER OR ALONG THE PUBLIC ROADS OR HIGHWAYS OF THE PARISH ABOVE DESIGNATED, (NOT WITHIN THE LIMITS OF ANY INCORPORATED CITY, TOWN OR VILLAGE) AND FIXING THE TERMS, CONDITIONS, AND LIMITATIONS RELATIVE TO SAID FRANCHISE, RIGHT OR PRIVILEGE.

SECTION I: BE IT ORDAINED BY THE POLICE JURY OF THE PARISH OF LAFOURCHE, STATE OF LOUISIANA, IN REGULAR SESSION LEGALLY CONVENED: That there is hereby granted to J. C. Bertrand, a resident of the Parish of St. Mary, Louisiana, his heirs and assigns, the franchise and right and privilege over the public roads or state highways in

the Parish of Lafourche, Louisiana, (not within the limits of any incorporated City, Town or Village) and which said Public roads or State Highways are hereinafter referred to and designated, for convenience, as "The Highways", for the erection, construction, maintenance and operation of lines, poles, wires, conduits and appurtenances for the transmission of electric energy and electric current for heat, light and power and other purposes for which electricity may be used, in, over, under or along said Highways, within the limits stated, in the Parish of Lafourche, State of Louisiana, not within the limits of any incorporated City, Town or Village.

SECTION II: BE IT FURTHER ORDAINED, ETC. That this grant and right shall be without effect without the written consent and approval of the Louisiana State Highway Engineer or the Louisiana State Highway Commission and that no work done in pursuance to and in exercise of this franchise on said Highways in the Parish of Lafourche, Louisiana, shall be done in a manner contrary to or in conflict with the requirements of the existing laws of the State of Louisiana in reference to Public highways and particularly of Act No. 95 of 1921.

SECTION III: BE IT FURTHER ORDAINED ETC.: That this franchise, right and privilege is granted subject to the [fol. 31-G] supervision of the Police Jury of Lafourche Parish and the Louisiana Highway Engineer and under the following terms, stipulations and conditions:

(a) That before any of the electric transmission poles or power lines herein and hereby authorized are constructed the plans and specifications therefor shall be submitted to and approved by the Louisiana State Highway Engineer.

(b) That all poles, wires, and other necessary fixtures and appurtenances shall be erected under the supervision of the State Highway Engineer and subject to his approval, and that if said Highways should be disturbed or damaged in the erection, construction or maintenance of any work done under this franchise then the same shall be promptly replaced and repaired by the Grantee herein, his heirs or assigns, at his expense, to the satisfaction of the State Highway Engineer.

(c) That, in the erection, construction, and maintenance of any work done under this franchise, no trees along said highways shall be cut or trimmed without first obtaining the consent of the adjoining land owner, upon whose property said trees may be situated.

(d) That the said Grantee, his heirs or assigns, shall whenever it becomes necessary, remove or change the location of any of said poles or lines for the purpose of highway improvements, which he is requested to do by the Police Jury of the Parish of Lafourche, or the Louisiana State Highway Engineer or the Louisiana Highway Commission, without any expense to either of said bodies; that in case the said Grantee, his heirs or assigns, should at any time desire to abandon said electric transmission lines and remove the same from the State Highway, then, and in that event, he shall repair all damage done to said highways by said abandonment or removal at his own expense.

(e) That the said Grantee, his heirs or assigns, shall indemnify, protect, hold and save harmless the Parish of Lafourche and the Louisiana Highway Commission from any and all loss, damages or expenses which it or they may suffer or in any way be rendered subject to on account of [fol. 31-H] this grant and franchise.

SECTION IV: BE IT FURTHER ORDAINED, ETC.: That this ordinance and franchise shall have full force and effect from and after its adoption.

SECTION V: BE IT FURTHER ORDAINED, ETC.: That all ordinances or parts of ordinances contrary to or in conflict with the provisions of this ordinance, be and the same are hereby repealed.

THUS DONE, READ, ADOPTED, AND SIGNED AND SEAL AFFIXED IN open session at Thibodaux, Lafourche Parish, Louisiana, on this 8th day of June 1927.

LEON Z. BOUDREAUX
Pres. Police Jury of Lafourche Parish.

ATTEST:

CHAS. J. CONLON
Secretary.

[fol. 31-I] STATE OF LOUISIANA.
PARISH OF LAFOURCHE.

I, the undersigned Secretary of the Police Jury of the Parish of Lafourche, State of Louisiana, do hereby certify that the Police Jury of the Parish of Lafourche, State of Louisiana, is composed of Eleven (11) Police Jurors, and was so composed on the Eighth day of June, 1927.

I further certify that the said Police Jury of the Parish of Lafourche met in regular meeting, in the Town of Thibodaux, the Parish Seat of the Parish of Lafourche, on the eighth day of June, 1927, with the following Police Jurors present on Roll Call:

Mr. Leon Z. Boudreaux, President, and Messrs. J.L. Basset, C.J. Naquin, W.J. Thibodaux, Elfert P. Delaune, A.N. Martinez, L.A. Borne, W.S. Martin and Joseph Hernandez

There were absent, the following Police Jurors:

Messrs. Justillien Theriot and J.J. Rebstock.

The Police Jury was then duly convened by President Leon Z. Boudreaux.

At which said regular meeting of the Police Jury of the Parish of Lafourche held on the Eighth day of June, 1927, the above and foregoing Ordinance No. 536, was offered by Mr. Delaune, and seconded by Mr. Borne, and on being submitted to a vote, the vote thereon was as follows:

YEAS: Boudreaux, Basset, Naquin, Thibodaux, Delaune, Martinez, Borne, Martin and Hernandez.

NAYS: None.

And the said Ordinance was declared adopted.

I do further certify that the above and foregoing Ordinance No. 536, is a true and correct copy of the Original Ordinance, adopted by the Police Jury of the Parish of Lafourche, State of Louisiana, on the eighth day of June, 1927.

In Witness Whereof, I have hereunto affixed my Official signature and the impress of the seal of the Police Jury

of the Parish of Lafourche, at Thibodaux, Louisiana, this twenty-second day of the month of May, A.D. 1929.

/s/ Chas. J. Conlon
Secretary of the Police Jury of the Parish of Lafourche, State of Louisiana.

[fol. 31-J]

Memorandum of Agreement Between the Town of Thibodaux and Louisiana Power & Light Company

Meeting Held 3:00 P.M., Wednesday, February 12, 1947, Thibodaux City Hall.

Representing Town of Thibodaux:

Charles E. Delas, Mayor
Henry P. Braud, Commissioner
Noah Ducasse, Commissioner
Hubert Lafargue, City Attorney
Ernest Thibodaux, Utility Plant Superintendent

Representing Louisiana Power & Light Company: C. N. Olivier

The meeting was called for the purpose of establishing recognized service area for the municipal electric plant of the Town of Thibodaux, and the electric utility services of the Louisiana Power & Light Company.

After a thorough discussion of all phases of service rendered, the following was agreed upon as the basis of adjustment, and for future operation.

That the Louisiana Power & Light Company would (if agreeable to customer) transfer service of the Coca Cola Company, now within the limits of the Town of Thibodaux, to the municipal electric plant. Also the proposed Nichols Junior College, located contiguous to the Town, shall be served by the municipal electric plant, and that any or all existing or future users of electric service without the presently established city limits and within the service area of Louisiana Power & Light Company shall be served by the Louisiana Power & Light Company, it being more specif-

ically agreed that, upon written request of the Town of Thibodaux, additional consumers may be served within the city limits by the Louisiana Power & Light Company and, upon written request of Louisiana Power & Light Company, additional consumers may be served by the municipal electric plant within the service area of the Louisiana Power & Light Company. The purpose of this being that it may be uneconomical for the Town of Thibodaux to serve a consumer in an area in which it has no utilities available and vice-versa.

It is further agreed that present consumers and prospective Bradford Ave.
[fol. 31-K] consumers facing Guion street from ~~Washington street~~ south shall be served by the Louisiana Power & Light Company.

For Louisiana Power & Light Company:

/s/ C. N. Olivier

For Town of Thibodaux:

/s/ Chas. E. Délas

/s/ Henry C. Braud

/s/ Noah Ducasse

[fol. 31-M]

LOUISIANA PUBLIC SERVICE COMMISSION

GENERAL ORDER

At a session of the Louisiana Public Service Commission held at its offices in Baton Rouge, Louisiana, on June 9, 1953, certain questions arose as to the degree of control which this Commission should exercise over sales, leases, mergers, consolidations, and changes of control of public utilities subject to its jurisdiction.

The Commission having been vested by the Constitution of 1921 with all necessary power and authority, among other things, to supervise, govern, regulate and control all street railroads, telephone, telegraph, gas, electric light and power, water works, and common carrier pipe lines, hereby recognizes the present ownership of every such public utility now coming under its jurisdiction in accordance with annual reports on file with this Commission for the year ended December 31, 1952, or for such fiscal year ended in 1952 as may be applicable.

The attention of the Commission has been called to the fact that utility systems have, in the past, been sold or otherwise effected change of ownership or control without authority and without the knowledge of the Commission or any member of its staff until after such sale or change of ownership has been consummated, and it is hereby:

ORDERED, that from the date of this order, the sale, lease, merger, consolidation, or other change in the ownership of the assets of public utilities or any controlling part thereof subject to the jurisdiction of this Commission is hereby prohibited without first having obtained an order of authority from the Commission for such change in ownership.

BY ORDER OF THE COMMISSION:

BATON ROUGE, LOUISIANA
JUNE 16, 1953

(SIGNED) HARVEY BROYLES
CHAIRMAN.

(SIGNED) WADE O. MARTIN, SR.
COMMISSIONER

(SIGNED) NAT B. KNIGHT, JR.
COMMISSIONER

(SIGNED) C. W. COLEMAN

[fol. 31-O]

Inventory of Material at
CITY PLANT SUBSTATION

Item #1

Material	*Each*
Pole, 50'/5	1
" , 35'/5	2
Crossarms, 8'-6 Steel Pin	15
" , 10'-6 " "	9
Brace, 28" Crossarm	46
Bolt, 5/8" x 20" Double Arm	44
" , 5/8" x 12" Machine	5
" , 3/8" x 4 1/2" "	46
Eyenut, 5/8" Galvanized	29
Screw, 1/2" x 4" Lag	23
Pin, 5/8" Light Steel	25
Hook, Down Guy	1
Clamp, 3 Bolt	2
Wire, 5/16" Galvanize Guy	50'
Anchor, 12000 # 10 x 40 Plate	1
Rod, 12,000 # Anchor 1" x 10'	1
Insulator, 13 KV Top Groove	22
" , 2.3 KV Top Groove	3
" , 10"—Suspension	6
" , 6 1/2" Suspension	30
" , 6" Strain	9
Hook, D.E. Suspension	3
Eye, D.E. Suspension Socket	3
Washer, 2" Square	142
" , 7/16" Round	46

[fol. 31-P]

Clevis, 4"	9
Clevis, 2"	9
Switch, 15 KV 50 Amp	3
Switch, 200 Amp. Blade Disc.	3
Connectors, #2 Solderless	42
" , #1/0 "	5
Thimble, 1/0 A.C.S.R. D.E.	6
Timber, 4" x 6" x 18' Creosoted	1
Wire, #2 3-Strand Copper	600'

Material	*Each*
Wire, #1/o Copper	150′
Wire, #8 BSD Tie	10′
Transformers:	
150 C 4613 13.8/2.3 KV	1
150 C 4614 " "	1
150 C 4615 " "	1
Foundation:	
2″ x 8″ x 8′ Boards	24
6″ x 12″ x 20′ Boards	2
6″ x 12″ x 10′ Boards	2
Metering:	
2.5 Amp. 120V 1ø	1
5 Amp 3ø Type DW-14	1
Conduit, 1″ Galv. Pipe	50′
Fitting, Type E	4

[fol. 31-Q]

Metering: (Cont'd)	
Fitting, Type C	3
" , Type LB	2
Transformer, 40 A Current	2
" , 14.4/120 Potential	2
Fence:	
12′-0″ x 25′-0″ Hog Wire Above and Barbed Wire Below	Lot

May 30, 1957

[fol. 31-R]

Inventory of Material at
CANAL STREET SUBSTATION

Item #2

Material	*Each*
Pole 40/5	1
" 45/5	2
Crossarm, 8′-6 Stl. Pin	28
Brace, 28″ Crossarm Stl.	32
" 26″ " Wd.	20
Bolt, 5/8″ x 20″ Double Arm	51

Material	*Each*
Bolt, 5/8" x 14" Machine	2
" 5/8" x 12" "	5
" 3/8" x 4 1/2" "	52
Eye Nut, 5/8" Galvanized	60
Screw, 1/2" x 4" Lag	26
Pin, 5/8" Light Steel	26
Hook, DE Suspension	18
" DE Suspension Socket	18
Timber, 4" x 8" x 18' Creosoted	1
" 4" x 8" x 12' "	1
Washer, 2" Square	200
" 7/16" Round	52
Sleeve, Auto. DE Cu. #6	6
Insulator, 13 KV top Groove	26
" 10" Suspension	33
" 6 1/2" "	54
Switch, 200 Amp. Blade Disc.	3
" 15 KV 50 Amp. Fuse	5
[fol. 31-S]	
Switch, 15 KV H.G.O.A.B.	2
Arrestor, 2.3 KV Lightning	3
" 10 KV "	3
Connector, #6 Solderless	31
" #2 "	50
Clamp, Hot Line Screw Type	17
Wire, #2-3 Str. Cu. Bus & Riser	200'
" #6 BHD Cu. Bus & Riser	500'
Wire, #6 BHD Cu. Ground	50'
" #2-3 Str. Cu. Ground	100'
" #6 BSD Tie	10'
Transformers:	
250 C 4449 13.8/2.3 KV	1
" 4450 " " "	1
" 4451 " " "	1
5 KVA 7.6-120/240 V	2
Fan, G. E. Cat. 49X482	6
Regulators:	
105 AR 1978 2400 V	1
105 CR 3418 13000 V	1

Material	*Each*
Foundation:	
6″ x 8″ x 5′ Cross-Ties	8
8″ x 16′0″ Steel Beam	2
6″ x 8″ x 8′ Cross Ties	4
[fol. 31-T]	
Meter:	
2.5 A 120 V Type VW 3 A	2
Enclosure	2
Transformer, 5 KV 200 Amp Current	2
" 2.4 KV Potential	2
Fence:	
15′0″ x 40′ Hog Wire	Lot

May 30, 1957

[fol. 31-U]

Material Inventory of
LINE ON HWY. #1 AT EAST SIDE OF CITY LIMITS

Item #3

Material	*Each*
Pole 40′/5	4
Crossarms, 8′–6 Steel Pin	5
Brace, 28″ Crossarm	10
Bolt, 3/8″ x 4″ Machine	10
" 5/8″ x 12″ Machine	4
" 5/8″ x 20″ Doublearm	3
Eyenut, 5/8″ Galvanized	2
Pin, 5/8″ Light Steel	6
Pole Cap	4
Insulator, 13 KV Top Grove Pin	6
Screw, 1/2″ x 4″ Lag	5
Washer, 2″ Square	16
Washer, 7/16″ Round	11
Insulator, 10″ Suspension	2
Sleeve, #6 Auto. D.E.	2
Anchor, #1040 Plate	1
Wire, 5/16″ Galvanized Guy	50′
Clamp, 6″ 3 Bolt	2
Rod, 12000# Anchor 1″ x 10′	1
Hook, Down Guy	1

Material	*Each*
Wire, #8 BSD Cu. (Tie)	1
" #6 BSD Cu. (Tie)	1
" #6 Cu/Weld Ground	16#
Staples, 1 1/2" Ground Wire	100
Wire, #6 BHD Cu.	2608'

[fol. 31-V]

Material Inventory of

PORTION OF LINE EXTENSION ON WEST SIDE OF CITY

Item #4

Material	*Each*
Anchor, 8500 Lb. 8 x 20" Plate	2
Bolt, 3/8" x 4 1/2" Machine	14
" 5/8" x 10" "	4
" 5/8" x 12" "	3
" 5/8" x 16" "	1
" 5/8" x 20" "	5
Brace, 28" Crossarm	14
Clamp, 6"–3 Bolt	4
Crossarm 8'–6–Stl. Pin	7
Hook, Down Guy	2
Pin, 5/8" Light Steel	14
Pole, 35'/7	1
" 40'/5	5
Rack, 1 Wire Secondary	2
Screw, 1/2" x 4" Lag	7
Thimbleye, 5/8" Str.	2
Washer, 2" Sq.	30
" 7/16" Round	14
Wire, 1/4" Galv. Guy	50'
" 3/8" " "	50'
Connector, #6 Sold.	8
Insulator, 13 KV Top Groove	14
Cable, #4 ACSR	3600'
Ribbon, #4 ACSR	10
[fol. 31-W]	
Wire, #6 Al. Bare Tie	1
2w Concentric Cable	50'
Bracket, Screw Type Insulator (Service)	1

May 30, 1957

[fol. 31-X]

Material Inventory of
ONE SPAN OF WIRE AT NINE LOCATIONS

Item #5

Material	*Each*
Wire, #6 BHD Cu.	4200′
Wire, #2–3 Strand Cu.	1800′
Wire, #4 ACSR	2100′
Wire, #1/0 ACSR	1800′

May 30, 1957

[fol. 31-Y]

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Hearing on All Defenses in Defendant's Answer

APPEARANCES:

Theo Cangelosi, Esq., Baton Rouge, Louisiana. Attorney for City of Thibodaux.

J. Raburn Monroe, Esq., Monroe & Lemann, Whitney Building, New Orleans, Louisiana. Attorneys for Louisiana Power & Light Company.

(The above entitled and numbered matter came up for hearing on this, the 12th day of June, 1957, in the Courtroom, U.S. Post Office Building, New Orleans, Louisiana; The Honorable J. Skelly Wright, District Judge, presiding.)

[fol. 31-Z] Proceedings

The Court: In Number 6444, City of Thibodaux versus Louisiana Power & Light Company, is Counsel ready?

Mr. Monroe: We are ready.

Mr. Cangelosi: We are ready.

Mr. Monroe: Before the argument, I would like to introduce a stipulation. I think Counsel for the City of Thibodaux would like to make a statement in connection with it. This is a stipulation which was prepared by Counsel for Louisiana Power & Light Company following a conference

with Counsel for the Plaintiff. I understand Counsel for the Plaintiff is agreeable to it except that as to the memo agreement between the town of Thibodaux and Louisiana Power & Light, and Counsel would like to make a statement.

Mr. Cangelosi: May it please the Court, I think this should go into the record. We agree to stipulations Numbers 1, 2, 4, 5, and 6, with this reservation to 6: That it would be subject to check and confirmation as to the properties listed by our engineers. Stipulation 6 refers to certain properties which have been declared in the stipulation by Louisiana Power & Light as being within the City of Thibodaux, and as not being included in the properties described in our petition, and we except to that stipulation assuming, of course, they know what property they own within the city, subject to check by our engineers.

[fol. 31-AA] The Court: Is that agreeable as to 6?

Mr. Monroe: Yes, sir.

The Court: What about 3?

Mr. Cangelosi: As to Number 3 we admit only that this so-called agreement between the town of Thibodaux and Louisiana Power & Light was signed by these individuals: Charles Delas, Henry P. Braud, and Noah Dugas.

Mr. Monroe: Excuse me. You agree that they were the Mayor and trustees of Thibodaux at the time of the agreement?

Mr. Cangelosi: Yes.

We deny, however, that that alleged agreement is binding in any way on the municipality for a number of reasons.

The Court: You deny the legal effects of it? You admit such an agreement was sought to be entered into, and actually was signed and so on?

Mr. Cangelosi: Yes, but not on behalf of the city. We say it is absolutely null and void, and of no effect.

The Court: You deny the legal effect of it?

Mr. Cangelosi: Right.

The Court: I think we understand each other.

(Argument of Counsel.)

[fol. 31-BB] Reporter's Certificate (omitted in printing).

[fol. 32]

IN THE UNITED STATES DISTRICT COURT

OPINION OF COURT—June 25, 1957

Wollen J. Falgout, Theo F. Cangelosi, Louis Claiborne, Attorneys for Plaintiff.

Harvey Peltier, Donald Peltier, Monroe & Lemann, Andrew P. Carter, J. Raburn Monroe, Melyin Schwartzmann, Attorneys for Defendant.

Wright, District Judge:

The City of Thibodaux, operator of a municipally owned electric utility plant, seeks in these proceedings[1] to condemn facilities owned and operated by the Louisiana Power & Light Company in that section of the city recently acquired by extension of the city's limits. Act 111 of 1900[2] is [fol. 33] suggested as containing the authority of the city to condemn these facilities.

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[1] Jurisdiction in this case is based on diversity of citizenship. It was removed by the defendant from the state court.

[2] La. R.S. 19:101 et seq. La. R.S. 19:101 reads:

"Any municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the mayor and council of the municipality. When the municipal council cannot agree with the owner thereof for its purchase, the municipal corporation through the proper officers may petition the judge of the district court in which the property is situated, describing the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenances, fixtures, improvements, mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith, and praying that the property described be adjudged to the municipality upon payment to the owner of the value of the property plus all damages sustained in consequence of the expropriation. Where the same person is the owner of both gas, electric light, and water works plants, or of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person.

"All claims for damages to the owner caused by the expropriation of any such property are barred by one year's prescription, running from the date on which the property was actually taken possession of and used by the political corporation."

In 1900, when Act 111 was passed by the Louisiana Legislature, the operations of utilities serving the cities of the State of Louisiana were usually confined to the territorial limits of the municipalities. In other words, there was a power plant in the city with sufficient conduits and lines emanating therefrom to service the homes and the industry in the area. Act 111 provides that such a plant, with its service accessories, when owned by private utility, may be condemned by the city for the operation of a public utility.

The defendant, Louisiana Power & Light Company, operates a private electric utility system servicing a large part of the state of Louisiana. Electric energy sufficient to service this large area is obtained from two plants operated by the defendant, its sterlington plant near Monroe, Louisiana, and its plant at Nine Mile Point near New Orleans, Louisiana. The defendant operates in various parishes and municipalities through franchises obtained from those bodies. It holds a franchise from the Parish of Lafourche covering the area in suit, the area now part of the City of Thibodaux by reason of the recent extension of the city's limits. The question presented by this litigation is whether the City, under Act 111 of 1900, may condemn, not the plant or plants with their accessories operated by the defendant utility, but whether the City may condemn only that portion of the defendant's system, the poles, the lines, etc., [fol. 34] which service the newly annexed section of Thibodaux.

Although the power of eminent domain inheres in the United States and several states as an incident to their sovereignty,[3] the grant of that power by these sovereigns to one of their subdivisions will never pass by implication, for the power of eminent domain is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice.[4] When the power is granted by the state to

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[3] *Georgia* v. *Chattanooga*, 264 U.S. 472; *Kohl* v. *United States*, 91 U.S. 367; *Pollard's Lessee* v. *Hagan*, 44 U.S. 212.

[4] *Delaware, Lackawanna and Western R. Co.* v. *Morristown*, 276 U.S. 182; *Richmond* v. *Southern Bell Telephone and Telegraph Co.*, 174 U.S. 761; *Orleans-Kenner E. Ry. Co.* v. *Metairie Ridge Nursery Co.*, 136 La. 968, 68 So. 93; *Bréaux* v. *Bienvenu*, 50 La. Ann. 1324, 25 So. 321; *Martin* v. *Patin*, 16 La. 55; La. C.C. Art. 699.

one of its subdivisions, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.[5] A federal court, therefore, before recognizing the exercise of power of eminent domain by a subdivision of a state under a state statute, must make certain that that power has been granted by the state to the subdivision in the form of its attempted exercise.

[fol. 35] There are no state court decisions to guide this court in the resolution of this problem. In fact, it does not appear that any court at any time has ever interpreted Act 111 of 1900. The Attorney General of the State of Louisiana, in an opinion rendered October 10, 1951, in a situation identical to the one in suit, advises that a city may not expropriate a part of a utility system, in an area recently acquired by extension of the city limits, for the purpose of adding those facilities to the presently existing municipally operated utility. While the opinion of the Attorney General, of course, is not binding on this court under *Erie R. Co. v. Tompkins*, 304 U.S. 64, nevertheless, coming from the chief legal officer of the state whose statute is to be interpreted, it gives this court pause. It points up the fact that no authoritative interpretation of the statute has ever been made by a Louisiana court. And before a federal court, under its diversity of citizenship jurisdiction, ventures into the field of expropriation under authority of a heretofore uninterpreted Louisiana statute, the need of guidance from the Supreme Court of Louisiana becomes clear.

Under these circumstances, the only way this court can determine with certainty whether the power sought to be exercised here exists in the City of Thibodaux is to have a decision of the Supreme Court of Louisiana so holding. An interpretation of the expropriation statute in suit may be obtained through the Louisiana Declaratory Judgment pro-
[fol. 36] cedure[6] and this court may act with assurance in these proceedings after such interpretation is obtained.[7]

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[5] See Note 4.

[6] La. R.S. 13:4231 et seq.

[7] See *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229.

Further proceedings herein, therefore, will be stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900.

(s) J. Skelly Wright, United States District Judge.

New Orleans, Louisiana, June 21, 1957

IN THE UNITED STATES DISTRICT COURT

ORDER STAYING FURTHER PROCEEDINGS PENDING DECISION—June 25, 1957

Wright, J.:

This cause came on at a former day, to be heard on all defenses set out in defendant's answer, and was argued by counsel for the respective parties and submitted, when the Court took time to consider.

Now, on due consideration thereof, and for the written reasons of the Court on file herein,

It Is Ordered by the Court that further proceedings herein be stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900.

(s) J. S. W.

[fol. 37]

IN THE UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 23, 1957

Notice is Hereby Given that the City of Thibodaux, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order entered in this action on the 25th day of June, 1957.

(s) Wollen J. Falgout, City Attorney, (s) Theo. F. Cangelosi, Special Counsel, (s) Louis F. Claiborne, Special Counsel.

IN THE UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS—Filed August 22, 1957

City of Thibodaux, Plaintiff-Appellant, hereby designates the entire record in these proceedings as the transcript on appeal in the above entitled and numbered action.

Wollen J. Falgout, City Attorney, Theo F. Cangelosi, Special Counsel, Louis F. Claiborne, Special Counsel, By: (s) Louis F. Claiborne.

[fol. 38]

IN THE UNITED STATES DISTRICT COURT

MOTION AND ORDER TO FILE EXHIBITS IN ORIGINAL FORM

City of Thibodaux, Plaintiff-Appellant, moves the Court for permission to file the exhibits herein in original form on appeal.

Wollen J. Falgout, City Attorney, Theo F. Cangelosi, Special Counsel, Louis F. Claiborne, Special Counsel, By: (s) Louis F. Claiborne.

ORDER

It Is Ordered that the City of Thibodaux, Plaintiff-Appellant herein, be, and it is hereby granted permission to file the exhibits herein in original form on appeal.

New Orleans, Louisiana, this 26th day of August, 1957.

(s) Herbert W. Christenberry, United States District Judge.

[fol. 39] Clerk's Certificate to foregoing transcript omitted in printing).

[fol. 40] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,870

CITY OF THIBODAUX, Appellant,

versus

LOUISIANA POWER & LIGHT COMPANY, Appellee.

MOTION TO DISMISS APPEAL WITHOUT AWAITING ORAL ARGUMENT—Filed November 4, 1957

The Louisiana Power & Light Company, Appellee in the above styled cause, moves the Court to dismiss the appeal taken by the Appellant, and as grounds for this Motion, says:

(1) On June 21, 1957, the U. S. District Court for the Eastern District of Louisiana ordered that:

"Further proceedings herein, therefore, will be stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900."

(2) The appeal herein is from the above described order.

(3) The order of the District Court staying proceedings is not a "final judgment" and therefore not appealable.

Wherefore, appellee prays and moves that this appeal be dismissed without awaiting oral argument.

Respectfully submitted,

Harvey Peltier, Donald Peltier, Monroe & Lemann, J. Raburn Monroe, Melvin I. Schwartzman, Andrew P. Carter, By Andrew P. Carter.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 41]

[Title omitted]

MEMORANDUM IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL WITHOUT AWAITING ORAL ARGUMENT

May it Please the Court:

The Appellant, City of Thibodaux, Plaintiff below, sought by instituting this action to condemn and expropriate property of the Appellee, Louisiana Power & Light Company. Upon argument, orally and by brief, the District Court rendered an opinion on June 21, 1957, ordering that:

> "Further proceedings herein . . . be stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900."

Appellant has brought this appeal from the order of June 21, 1957. 28 U.S.C.A., §1291 says, in pertinent part, that:

> "The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the District Courts of the United States . . . except where a direct review may be had in the Supreme Court."

The only exception to the above rule that jurisdiction is confined to "final decisions" is contained in the following section 1292, which sets forth that the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the District Court granting, continuing, modifying, refusing or dissolving *injunctions*, or refusing to dissolve or modify *injunctions*, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing *receivers* or refusing orders to wind up *receiverships;*

(3) Interlocutory decrees determining the rights and liabilities of the parties in *Admiralty* cases;

(4) Judgments in civil action for *patent infringement.*

The cause before the Court is solely an expropriation matter and has no relationship to injunctions, receivers, ad-

CITY LIMITS

LA. POWER & LIGHT POLE LINES

PROPOSED SUBSTATION
LINE TO SERVE 4000 H.P.
LOAD AT CITY LIMIT

3.2 MI.

PROPOSED 336,400 C.M. ACSR

TO HOUMA

TO THIBODAUX

400' 800' 1200'

NO.	DATE	REVISION	BY	CH.	APP.

LOUISIANA POWER & LIGHT COMPANY
ALGIERS, LOUISIANA

THIBODAUX:
SHOWING CITY LIMITS
& L. P. & L. CO. POLE LINES

SCALE:	DATE:
DRAWN BY:	CHECKED BY:
TRACED BY: LEC	APPROVED BY:

NO. B-6-1232

LEGEND

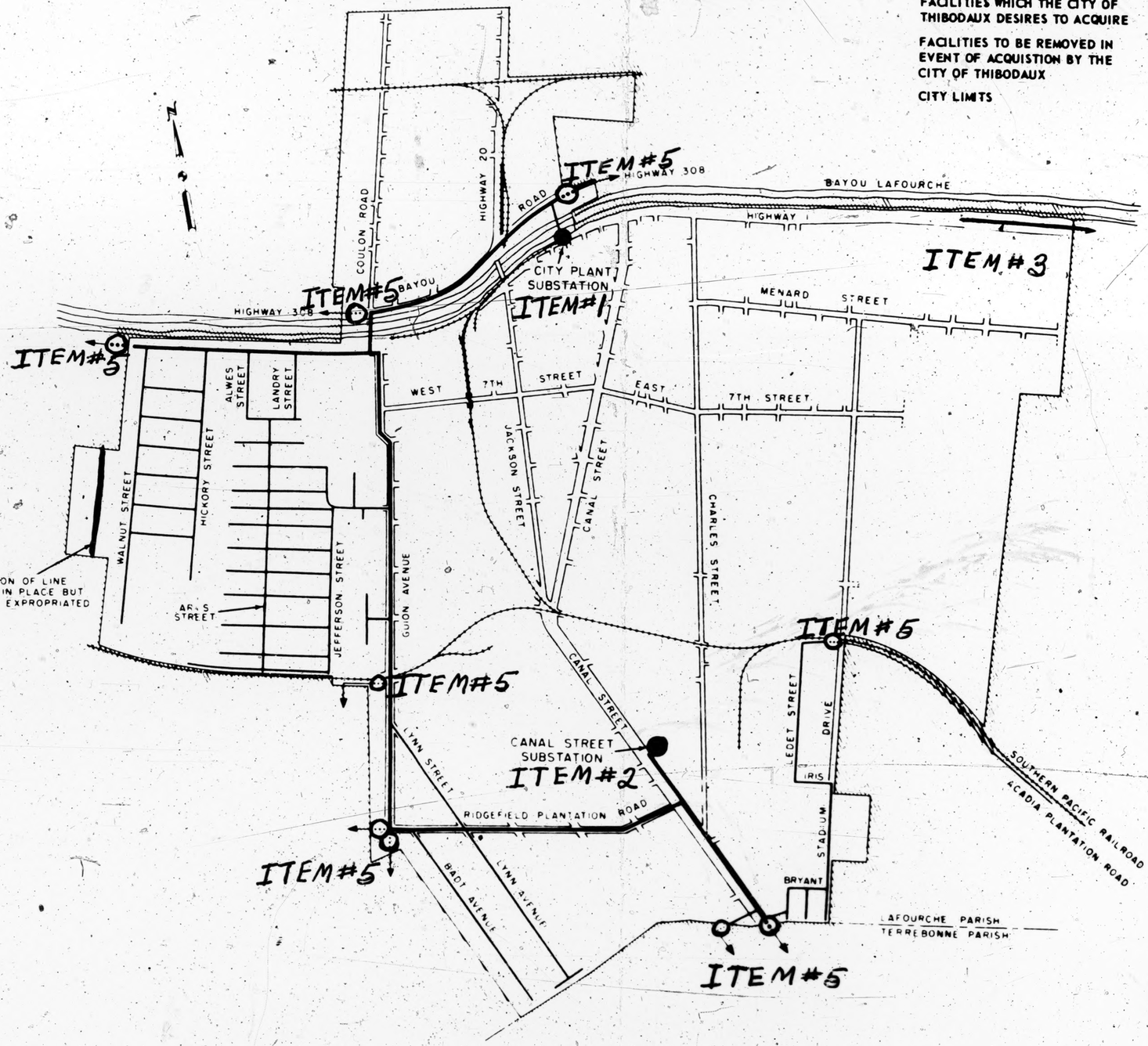
13,800 VOLT INTERSUBSTATION FEEDERS

OTHER DISTRIBUTION SYSTEM FACILITIES

FACILITIES WHICH THE CITY OF THIBODAUX DESIRES TO ACQUIRE

FACILITIES TO BE REMOVED IN EVENT OF ACQUISTION BY THE CITY OF THIBODAUX

CITY LIMITS



LOUISIANA POWER & LIGHT COMPANY

ELECTRIC DISTRIBUTION SYSTEM FACILITIES OWNED BY THE LOUISIANA POWER & LIGHT COMPANY IN THE CITY OF THIBODAUX, LOUISIANA

EXISTING FACILITIES AS OF FEBRUARY 15, 1957

JACKSON & MORELAND, INC., ENGINEERS
BOSTON NEW YORK

miralty matters, or patent infringements. Thus, unless the order below be considered a "final decision," it is not re- [fol. 42] viewable by this Court. E.g., *Breeding Motor Freight Lines* v. *R.F.C.*, 172 F.2d 416; *U.S.* v. *Rosenwasser*, 145 F.2d 1015; *Leonard* v. *Socony-Vacuum Oil Co.*, 130 F.2d 535.

The term "final decision" or "final judgment" is generally considered to mean a judgment or decree that terminates the litigation on the merits, so that in case of affirmance, the trial court will have nothing to do but to execute the judgment or decree it originally rendered. *Benman* v. *U.S.*, 302 U.S. 211, 58 S.Ct. 164; *U.S. Sugar Corporation* v. *Atlantic Coastline Railroad Company*, 196 F.2d 1015; *Lewis* v. *E. I. DuPont-De Nemours & Co.*, 183 F.2d 29, 21 A.L.R. 2d 757. The purpose of this requirement of finality has been often stated to be the prevention of piecemeal litigation and appellate interference with district court approaches toward currently unrealized final adjudications. *Siebrand* v. *Gossnell*, 234 F.2d 81; *Lewis* v. *DuPont-DeNemours*, supra.

"Interlocutory orders" have generally been defined as those which do not decide the cause but which settle some intervening matter relating to it. *Gas and Electric Securities Company* v. *Manhattan and Queens Traction Corporation*, 266 F. 625, appeal dismissed, 262 U.S. 196, 43 S.Ct. 513; *Cyclopedia of Federal Procedure*, Vol. 13, §57.13. There have been attempts heretofore to appeal from orders staying proceedings in condemnation cases, with the result being that which this Appellee seeks here, namely, dismissal on the grounds that the stay order was not a "final decision." *U. S.* v. *Richardson*, 204 F.2d 552; *Catlin* v. *U.S.*, 324 U.S. 229, 65 S.Ct. 661; *So. Railway Co.* v. *Postal Tel. Cable Co.*, 93 F. 393, affirmed 179 U.S. 641, 21 S.Ct. 249.

In sum, we submit that (1) the order appealed from here is interlocutory and not final; (2) this Court has jurisdiction only to review final and interlocutory orders; (3) condemnation proceedings do not form one of the exceptions to the general rule of finality; (4) stay orders in condemnation proceedings have universally been denied review on the basis of their interlocutory nature. Appellee suggests, therefore, that justice will best be served here by granting the motion to dismiss this appeal without awaiting oral

argument, since this appeal is so patently defective that oral argument would only be a frivolous waste of time of both this Court and the parties hereto.

Respectfully submitted,

Harry Peltier, Donald Peltier, Monroe & Lemann, J. Raburn Monroe, Melvin I. Schwartzman, Andrew P. Carter, By Andrew P. Carter,

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[fol. 43] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Title omitted]

ANSWER TO MOTION TO DISMISS APPEAL—
Filed November 19, 1957

City of Thibodaux, plaintiff and appellant herein, in answer to the Motion to Dismiss Appeal filed herein by Louisiana Power & Light Company, appellee, says:

1. That the appeal herein was taken under, and is authorized by Section 1292(1) of Title 28 of the United States Code.

Wherefore, Appellant prays that the Motion to Dismiss Appeal be denied and that the appeal herein be set for hearing on the earliest practical date.

Wollen J. Falgout, City Attorney, Theo. F. Cangelosi, Special Counsel, Louis Fenner Claiborne, Special Counsel, By: /s/ Louis F. Claiborne.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 44]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Title omitted]

MEMORANDUM IN SUPPORT OF APPELLANT'S ANSWER TO MOTION TO DISMISS

May it Please the Court:

Defendant urges dismissal of this appeal on the ground that the order complained of is neither a "final judgment" within the meaning of 28 U.S.C.A., Sec. 1291, nor one of those "interlocutory orders" listed in Section 1292 of the same Title.

It is true that tested by the general standard of "finality", announced, among others, in the cases cited by appellee, the present order is not a "final judgment". But, of course, to every rule there are exceptions, and at least two members of the present Supreme Court have indicated that the decision here complained of should be regarded as sufficiently "final" to be appealable under Section 1291. See Mr. Justice Black, with whom Mr. Justice Douglas concurred, dissenting, in *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176 (1955), at 185-186; See also, Mr. Justice Black, with whom Mr. Justice Rutledge concurred, dissenting, in *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254 (1949), at 261-264. Nevertheless, we prefer not to press this point, relying primarily on Section 1292.

As to the appealability of the decision as an interlocutory order under Section 1292, appellee completely bypasses the obvious issue. The Company invokes a purported rule to the effect that stay orders in condemnation matters are not [fol. 45] appealable, but neither the cases it cites, nor any that we have been able to uncover, support that unqualified proposition. Indeed, two of the decisions it relies on, *Catlin* v. *U.S.* and *So. Railway Co.* v. *Postal Tel. Cable Co.*, do not involve stay orders but preliminary ex parte judgments in favor of the condemnor. The only other case cited, *U.S.* v. *Richardson*, involved the abatement of proceedings until the complainant had complied with a Court Order directing the taking of a deposition, and is clearly distinguishable from the instant case.

The true issue, avoided by appellee, is whether the decision complained of is an interlocutory order "granting . . . an injunction" within the intendment of Paragraph (1) of Section 1292. If the instant order can be so qualified, as we contend, it is, on that account alone, appealable, whether or not "final".

It must be conceded that the appellate jurisprudence on the question whether an order staying proceedings in the Federal court action until a decision is rendered elsewhere amounts to the grant of an injunction in the sense of Section 1292 (1) is not altogether clear. The United States Supreme Court has answered: "sometimes, yes; sometimes, no"; the criterion of appealability apparently being the nature of the original proceeding, whether brought "at law", or "in equity". Thus, in *Enelow* v. *N. Y. Life Ins. Co.*, 293 U.S. 379 (1935), and *Ettelson* v. *Metro. Ins. Co.*, 317 U.S. 188 (1942), orders staying *law* proceedings on an insurance policy until the same court, sitting in equity, passed on an equitable defense, were held appealable. So also, in *Shanferoke Co.* v. *Westchester Co.*, 293 U.S. 449 (1935), an appeal was allowed from the denial of a motion for a stay of a *legal* action on a contract pending a referral of the dispute to arbitration. On the other hand, orders denying a stay of proceedings *in equity* were held unappealable in *Morgantown* v. *Royal Ins. Co.*, 337 U.S. 254 (1949), and *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176 (1955).

[fol. 46] Confronted with these authorities, the Courts of Appeals have sometimes disagreed and there appears to be some conflict remaining between the various Circuits. But the greater number of decisions, especially among the most recent, support our position that a stay order is appealable. See, e.g., *Hudson Lumber Co.* v. *United States Plywood Corp.*, 181 F.2d 929 (9th C., 1950); *Bernhardt* v. *Polygraphic Company of America*, 235 F.2d 209 (2d C., 1956); *Signal-Stat Corporation* v. *Local 475, etc.*, 235 F.2d 298 (2d C., 1956); *Ross* v. *Twentieth Century-Fox Film Corporation*, 236 F.2d 632 (9th C., 1956); *Council of Western Elec. Tech. Emp.* v. *Elec. Co.*, 238 F.2d 892 (2d C., 1956). See also *Jewell* v. *Davies*, 192 F.2d 670, 673 (6th C., 1951).

Pending a clearer pronouncement by the Supreme Court, we submit that the only rule to be read in its decisions to

date is that *an order staying an action at law is appealable,* while a similar order suspending proceedings in equity is not. Such is the recent conclusion of that eminent jurist, former Chief Judge Learned Hand of the Second Circuit, who, speaking for the Court in *Council of Western Elec. Tech. Emp.* v. *Elec. Co., supra,* at 894, said:

> "Amid the existing confusion of decisions it is hard to proceed with assurance; but we take it as now settled that the grant, or denial, of a stay in an action that would have been a suit in equity before the fusion of law and equity is now not appealable under Sec. 1292 (1) of Title 28; but, if the order is in an action that would have been an action at law before that time, it is appealable."

Under this rule it is clear that the order here complained of is appealable, since the instant condemnation proceeding is an action at law.

* * * * * * *

However, should this Court be impressed by some of the apparently contrary decisions, in other Circuits, we suggest an important distinction between these cases and this one. In each of the decisions referred to the stay was to [fol. 47] operate only until a decision was reached in an *already pending* proceeding elsewhere, or else the stay order itself was accompanied by another directing *immediate* recourse to arbitration. See, e.g., *London Records* v. *De Golyer, Jr.,* 217 F.2d 574 (5th C., 1954); *United Gas Pipeline Company* v. *Tyler Gas Service Company,* 247 F.2d 681 (5th C., 1957); *Day* v. *Pennsylvania Railroad Company,* 243 F.2d 485 (3rd C., 1957). The stay order could therefore properly be considered a mere step in the conduct of the case and the denial of an appeal from such a decision is understandable. In the present case, on the contrary, the abatement of the action has no term, does not look to any pending decision, and the denial of an appeal from it would work serious delay, if not a denial, of justice.

* * * * * * *

In the alternative, should the Court feel compelled to dismiss the instant appeal, appellant urges that its appeal

be considered as a petition for mandamus directing the District Judge to vacate the stay order entered, or at least, that it afford appellant the opportunity of filing such a petition. See *Travelers' Protective Ass'n. v. Smith*, 71 F.2d 511 (4th C., 1934); *Magnetic Engineering and Manufacturing Co.* v. *Dings Manufacturing Co.*, 178 F.2d 866 (2nd C., 1950); *International Nickel Co.* v. *Martin J. Barry, Inc.*, 204 F.2d 583 (4th C., 1953); *Lyons* v. *Westinghouse Electric Corporation*, 222 F.2d 184 (2nd C., 1955).

Conclusion

For the foregoing reasons appellant, City of Thibodaux, prays that the motion to dismiss its appeal herein be denied, and, alternatively, that its appeal be considered in the nature of a petition for mandamus directing the District Judge to vacate the stay order entered herein, or granting leave to appellant to file such a petition.

Respectfully submitted,

Louis Fenner Claiborne, Special Counsel, By: /s/ Louis F. Claiborne.

Wollen J. Falgout, City Attorney, Theo. F. Cangelosi, Special Counsel.

[fol. 48] Certificate of Service (omitted in printing).

[fol. 49]

In the United States Court of Appeals

[Title omitted]

Argument and Submission—January 15, 1958

On this day this cause was called and, after argument by Louis F. Claiborne, Esq., for appellant and J. Raburn Monroe, Esq., for appellee, was submitted to the Court.

[fol. 50]

In the United States Court of Appeals
for the Fifth Circuit

No. 16870

City of Thibodaux, Appellant,

versus

Louisiana Power & Light Company, Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

OPINION—April 18, 1958.

Before Hutcheson, Chief Judge, and Tuttle and Jones, Circuit Judges.

Jones, Circuit Judge: The City of Thibodaux, Louisiana, supplied electric current to consumers within its territorial area. It extended its boundaries and annexed an area which had been supplied with electric current by the Louisiana Power & Light Company. The City brought a suit for expropriation in a Louisiana District [fol. 51] Court against the power company seeking to acquire the electric distribution facilities situate in the annexed area. The City asserted that the power to condemn had been granted by a legislative enactment of 1900 which provided:

> "ANY municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the mayor and council of the municipality. When the municipal council cannot agree with the owner thereof for its purchase, the municipal corporation through the proper officers may petition the judge of the district court in which the property is situated, describing the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenance, fixtures, improvements, mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith, and praying that the property described be adjudged to the municipality upon payment to the owner of the value of the property plus all damages sustained in consequence of the expropriation. Where the same person is the owner of both gas, electric light, and waterworks plants, or of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person.

> "All claims for damages to the owner caused by the expropriation of any such property are barred by one year's prescription, running from the date on which the property was actually taken possession of [fol. 52] and used by the political corporation." L. S. A. Title 19, § 101.

Diversity of citizenship formed the basis for removal to the United States District Court.

The power company, among other things, alleged in its answer that it had a franchise to serve the area with electric current and that if the quoted statutory provision be so construed as to permit the expropriation of its property it would be unconstitutional and invalid as impairing the obligation of its franchise contract and the taking of its property without due process of law. In addition to these questions arising under the Federal Constitution, the appellee asserted that the Louisiana statute violated four separate provisions of the Louisiana Constitution. A pre-trial conference was held. The district court concluded that since the statute had not been construed nor its validity passed upon by the Louisiana courts, the proceedings in Federal court should be stayed until a decision interpreting the Act by the Supreme Court of Louisiana could be obtained through the Louisiana Declaratory Judgment procedures. *City of Thibodaux v. Louisiana Power & Light Company,* 153 F. Supp. 515. By the district court's order further proceedings were stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret the Louisiana statute. The City appealed from the stay order. The power company has moved to dismiss the appeal on the ground that the order is not a final judgment and hence not appealable.

[fol. 53] Under the Federal statute[1] only civil actions may be removed from a state to a Federal Court. Although some state condemnation proceedings may not be, at every stage, removable civil actions,[2] the expropriation suit au-

[1] 28 U. S. C. A. § 1441.

[2] Chicago Rock Island & Pacific Railroad Company v. Stude, 346 U. S. 574, 74 S. Ct. 290, 98 L. Ed. 317; Village of Walthill v. Iowa Electric Light & Power Co., 8th Cir. 1956, 228 F. 2d 647.

thorized by the Louisiana act is a controversy between parties which is to be submitted to a judicial tribunal for determination by an exercise of the judicial power. Such proceeding is a civil action and so may be removed where, as here, diversity of citizenship and jurisdictional amount are present.[3]

The question is raised as to whether the order is one from which an appeal can be taken. The stay order of the district court is not a final decision under 28 U.S.C.A. § 1291.[4] Is it then an interlocutory order granting or denying an injunction which is appealable under 28 U.S.C.A. § 1292? It is not an injunction in form. Whether it is injunctive in substance is a question which is not without difficulty. We think that the rule as it has been evolved is as has been thus stated:

> "Amid the existing confusion of decisions it is hard to proceed with assurance; but we take it as now settled [fol. 54] that the grant, or denial, of a stay in an action that would have been a suit in equity before the fusion of law and equity is now not appealable under § 1292(1) of Title 28; but, if the order is in an action that would have been an action at law before that time, it is appealable." *Council of Western Electric Technical Employees v. Western Electric Company*, 2nd Cir. 1956, 238 F. 2d 892.[5]

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[3] Searl v. School District No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. Ed. 415; Madisonville Traction Co. v. Saint Bernard Mining Co., 196 U. S. 239, 25 S. Ct. 251, 49 L. Ed. 462.

[4] Baltimore Contractors, Inc. v. Bodinger, 348 U. S. 176, 75 S. Ct. 249, 99 L. Ed. 233.

[5] See Enelow v. New York Life Insurance Co., 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583; Ettelson v. Metropolitan Life Insurance Co., 317 U. S. 188, 63 S. Ct. 163, 87 L. Ed. 176; City of Morgantown v. Royal Insurance Co., 337 U. S. 254, 69 S. Ct. 1067, 93 L. Ed. 1347; Baltimore Contractors, Inc. v. Bodinger, 348 U. S. 176, 75 S. Ct. 249, 99 L. Ed. 233.

[6] See also Jewell v. Davies, 6th Cir. 1951, 192 F. 2d 670; Ross v. Twentieth Century-Fox Film Co., 9th Cir. 1956, 236 F. 2d 632;

The Supreme Court has had occasion to consider the nature of condemnation proceedings. It has said:

> "The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That is was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court." *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449.[7]

[fol. 55] The order entered by the district court granted a stay in an action at law and was an appealable order under 28 U. S. C. A. § 1292(1).

In an early and celebrated opinion by Chief Justice Marshall it was said:

> "It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. * * * With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L. Ed. 257.[8]

Cuneo Press, Inc. v. Kokomo Paper Handlers Union, 7th Cir. 1956, 235 F. 2d 108; Bernhardt v. Polygraphic Company of America, Inc., 2nd Cir. 1956, 236 F. 2d 209.

[7] The principle has been restated in Searl v. School District No. 2, 124 U. S. 197, 8 S. Ct. 460, 31 L. Ed. 415; Metropolitan Railroad Company v. District of Columbia, 195 U. S. 322, 25 S. Ct. 28, 49 L. Ed. 219.

[8] Cf. Williams v. Georgia, 349 U. S. 375, 75 S. Ct. 814, 99 L. Ed. 1161.

The doctrine announced in the foregoing quotation was applied in a suit for adjudication of heirship under state law. A stay order to permit a determination of the issue in the state court was held improper: *McClellan v. Carland*, 217 U. S. 268, 30 S. Ct. 501, 54 L. Ed. 762. Such was the general rule prior to Erie-Tompkins and such has been the general rule since Erie-Tompkins.[10] This general rule, applicable in diversity cases, is not without exception. In the case which is, perhaps, the leading and most often cited [fol. 56] of the cases comprising the exceptions, *Railroad Commission of Texas v. Pullman Company*,[11] an injunction was sought to restrain the enforcement of an order of a state administrative body on the ground that the order was not authorized by the state law and was violative of the Federal Constitution. The District Court granted the injunction. The decree was reversed. The Supreme Court held that the District Court should have stayed its hand, reserving its decision but retaining its jurisdiction until a proceeding for a determination of the state issues could be brought in a state court. In an opinion by Mr. Justice Frankfurter, the Court noted its reluctance to decide constitutional questions and the indecisiveness of Federal determinations of questions of state law. In such a situation, it was said:

> "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus surplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a permature constitutional adjudication." 312 U. S. 500.

Stressing the discretion vested in the courts in equitable causes and announcing the doctrine of abstention, the court observed that,

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[9] Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.

[10] Meredith v. Winter Haven, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9; Propper v. Clark, 337 U. S. 472, 69 S. Ct. 1333, 93 L. Ed. 1480, reh. den. 338 U. S. 841, 70 S. Ct. 32, 94 L. Ed. 514.

[11] 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971.

"This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority * * *." 312 U. S. 501.

[fol. 57] In other cases the staying of suits seeking injunctions to restrain the action or threatened action by state administrative bodies has been approved or directed.[12] The same rule furnished the guide to decision where an injunction was sought to restrain the enforcement of the Florida "Right to Work" constitutional provision,[13] where injunctions were sought to restrain the enforcement of state statutes,[14] and in a suit for a declaratory judgment construing and to enjoin the enforcement of a city ordinance.[15] A like result was reached in a suit to quiet title and for an injunction.[16] The doctrine of abstention was applied in a bankruptcy proceeding involving a question as to the extent of the bankrupt railroad's title to a right of way.[17] Bankruptcy proceedings are inherently proceedings in equity.[18]

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[12] Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 49 S. Ct. 282, 73 L. Ed. 652; Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573, 60 S. Ct. 1021, 84 L. Ed. 1368; 311 U. S. 614, 61 S. Ct. 66, 85 L. Ed. 390, reh. den. 311 U. S. 727, 61 S. Ct. 167, 85 L. Ed. 473; Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341, 71 S. Ct. 762, 95 L. Ed. 1002.

[13] American Federation of Labor v. Watson, 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873.

[14] Spector Motor Service v. McLaughlin, 323 U. S. 101, 65 S. Ct. 152, 89 L. Ed. 101; Shipman v. Du Pre, 339 U. S. 321, 70 S. Ct. 640, 94 L. Ed. 877, Government and Civic Employees Organizing Committee v. Windsor, 353 U. S. 364, 77 S. Ct. 838, 1 L. Ed. 2d 894.

[15] City of Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986, 86 L. Ed. 1355, reversing 122 F. 2d 132.

[16] Leiter Minerals, Inc. v. United States, 352 U. S. 220, 77 S. Ct. 287, 1 L. Ed. 2d 267, reh. den. 352 U. S. 1019, 77 S. Ct. 553, 1 L. Ed. 2d 560.

[17] Thompson v. Magnolia Petroleum Co., 309 U. S. 478, 60 S. Ct. 628, 84 L. Ed. 876, 42 A.B.R.N.S. 216.

[18] Local Loan Co. v. Hunt, 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A.L.R. 195, 24 A.B.R.N.S. 668; Texas Co. v. Miller, 5th

[fol. 58] The pattern is consistent. All of the cases are equitable. In the Pullman case the principles of equity are shown to be the basis of the doctrine of abstention and these principles were reiterated in the Fieldcrest Daries (sic) opinion. In a more recent case reference was made to the Spector Motor Co., Fieldcrest Daries, (sic) Pullman and Magnolia cases, and of them it was said:

> "The cases mentioned above where this Court require submission of single issues, excised from the controversy, to state courts were cases in equity. The discretion of equity as to the terms upon which it would grant its remedies, in the light of our rule to avoid an interpretation of the Federal Constitution unless necessary, was relied upon to justify a departure from normal procedure. * * *
>
> "The submission of special issues is a useful device in judicial administration in such circumstances as existed in the *Magnolia, Spector, Fieldcrest* and *Pullman* cases, supra, but in the absence of special circumstances, [Meredith v. Winter Haven] 320 U. S. at 236, 237, it is not to be used to impede the normal course of action where federal courts have been granted jurisdiction of the controversy." *Propper v. Clark*, 337 U. S. 472, 491, 492.

While the doctrine of abstention has been applied only in equity cases, including the Magnolia case in bankruptcy, it does not, of course, follow that equity jurisdiction alone is enough to warrant the use of the doctrine.[19] In the Meredith case, where declaratory and injunctive relief was sought, it was stated:

> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy

Cir. 1947, 165 F. 2d 111, cert. den. 333 U. S. 880, 68 S. Ct. 911, 92 L. Ed. 1155.

[19] Meredith v. Winter Haven, note 10.

or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. [Citing cases] When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely become the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act. The exceptions relate to the discretionary powers of courts of equity. An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity. [Citing authority]. Exercise of that discretion by those, as well as by other courts having equity powers, may require them to withhold their relief in furtherance of a recognized, defined public policy." *Meredith v. Winter Haven*, 320 U. S. 228, 234, 235.

[fol. 60] The expropriation proceeding from which this appeal stems is not one where equitable jurisdiction and the discretion incident to such jurisdiction are present. Nor do we find present any such exceptional circumstances as would require or permit the district court to delay its determination of the case pending a state adjudication of state issues, even if there was an equitable discretion which might be exercised.

The order of the district court is reversed and the cause is remanded.

Reversed and Remanded.

[fol. 61]

IN UNITED STATES COURT OF APPEALS

CITY OF THIBODAUX,

No. 16870. versus

LOUISIANA POWER & LIGHT COMPANY.

JUDGMENT—April 18, 1958

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is reversed; and that this cause be, and it is hereby, remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Louisiana Power and Light Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fol. 62]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Title omitted]

PETITION OF APPELLEE FOR REHEARING—Filed May 9, 1958

To the Honorable United States Court of Appeals for the Fifth Circuit:

Louisiana Power & Light Company, Appellee herein, respectfully presents this, its Petition for Rehearing on the following grounds:

I.

This cause was instituted on the basis of Act 111 of 1900, Louisiana Revised Statutes, Title 19, Section 101, *et seq.* The District Court pointed out in its opinion that this statute has never been interpreted by any court, Federal or State, since its passage. The District Court further pointed out that a court, before recognizing the exercise of power [fol. 63] of eminent domain by a subdivision of a state under a state statute, must make certain that that power has been granted by the state to the subdivision in the form of its attempted exercise since the power of eminent domain will never pass by implication.

II.

Appellee contended in the District Court, among other things, that the state statute did not grant the power of eminent domain to Appellant in the form of its attempted exercise.

III.

The District Court, after due consideration, decided that, ". . . the only way this court can determine with certainty whether the power sought to be exercised here exists in the City of Thibodaux is to have a decision of the Supreme Court so holding". Whereupon, the District Court ordered that, "Further proceedings herein, therefore, will be stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900."

IV.

Appellee contended in argument before this Honorable Court that a District Court sitting in a law matter had inherent power to grant a stay of proceedings in order to control the progress of the cause so as to maintain the orderly processes of justice.

V.

This Court, however, decided that since this was not a matter in equity, the District Court erred in ordering a

stay of proceedings. In so doing, this Honorable Court [fol. 64] erred in ignoring the important and vital question of whether or not the District Court in a law matter had the inherent power to stay proceedings in order to control the progress of the cause.

VI.

The inherent power in the District Court in a law matter to control the progress of the cause and maintain the orderly processes of justice is a well-recognized right.

VII.

Therefore, Petitioner respectfully submits that this Court erred:

1. By holding that "the doctrine of abstention has been applied only in equity cases".
2. By failing to pass upon the District Court's inherent power in a law matter to stay proceedings in order to control the progress of the cause, thus depriving those within the venue of this Circuit of the desired knowledge of this Court's position.
3. By its failure to recognize that the construction given to a state statute by state courts is binding upon federal courts and, therefore, where there are no interpretations of a statute by state courts, a federal court should abstain from interpreting the state statute until such time as opportunity has been afforded the state courts to interpret the statute in question.
4. By not dismissing the appeal on grounds that the District Court properly exercised its inherent power to [fol. 65] control the progress of the cause and properly stayed proceedings pending determination of the validity of the statute in question by the Supreme Court of Louisiana.

Wherefore, Petitioner, for the reasons assigned, and for the further reasons appearing in the brief hereto, prays that a rehearing be granted and that, in due course, the

appeal in this matter be dismissed and the decision of the District Court affirmed; that the mandate of this Court be stayed pending disposition of this action; and for such other relief as this Court may deem just and proper.

Respectfully submitted,

Peltier & Peltier, Harvey Peltier, Donald Peltier; Monroe & Lemann, J. Raburn Monroe, Melvin I. Schwartzman, By Andrew P. Carter, Attorneys for Louisiana P. & L. Co.

[fol. 67]

[Title omitted]

BRIEF IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING.

May It Please the Court:

A careful review of the District Court's decision in this matter reveals that the reasoning which caused that Court to stay proceedings was based principally on these factors:

1. Act 111 of 1900 (R. S. 19:101, *et seq.*) has never been interpreted by any Federal or State court.

2. Eminent domain is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice.

[fol. 68] 3. The grant of the power of eminent domain never passes by implication, but must be clear and express.

4. One among the many issues raised by the answer herein was whether the power allegedly granted by the State in Act 111 of 1900 was in fact granted in the form of its attempted exercise, thus placing at issue the critical question as to whether or not there was a clear and express grant of power of eminent domain.

On the basis of these expressed factors by the District Court, there is brought into sharp focus the real question before this Honorable Court, *i.e.*, did the District Court

have the inherent power in its discretion to control the progress of the cause before it in an orderly manner to stay this proceeding and did it abuse that discretion?

A proper appraisal of that question, in addition to the authorities which we shall later cite, must take into account the factual situation confronting the District Court and the parties: Although this Court might consider this cause to be an "action at law" (p. 6 of Opinion), Act 111 of 1900 as well as the other expropriation statutes of Louisiana (R. S. 19:1, *et seq.*) does not provide the *sine qua non* of the usual action at law, a jury trial. Under the expropriation statutes of Louisiana, including Act 111 of 1900, there is no right to trial by jury. R. S. 19:4. Also, and even more important in this matter, there is no right of suspensive appeal generally in Louisiana. R. S. 19:13; Act 111 of 1900, Section 5. Thus, if the District Court decided this matter adversely [fol. 69] to Appellee, and that decision was later found to be in error, the damage would be done. Appellee would have suffered irreparable injury without any remedy available to it.[1] This was known to the District Court and undoubtedly gave considerable cause for pause; and we respectfully say that it should certainly give this Court cause for proceeding with great caution in its resolution of the propriety of the District Court's action.

Turning now to consideration of the legal basis for the District Court's stay order, we assert first that there is no clearer doctrine in Federal jurisprudence than that the Federal courts are bound by and obligated to follow the interpretations of State Constitutions and statutes by the highest court of a state. *U. S., ex rel. Touhy* v. *Ragen*, 224 F. (2d) 611, cert. denied, 76 S. Ct. 470, 350 U. S. 983; *Lee-Wilson, Inc.* v. *General Electric Co.*, 222 F. (2d) 850; *Davis* v. *City of Little Rock*, 136 F. Supp. 725; *Audiocasting*,

[1] In fact, this statute constitutes such an abuse to Appellee's right of reparation in event of error by a lower court as to strike it with complete nullity. An examination of Section 5 shows that it does not contemplate any avail to the property holder being expropriated. If on appeal the property holder should prevail, the reviewing court would have no authority to order a return of the property. This is patently an unconstitutional device. Small wonder the District Court ordered a stay!

Inc. v. *State of Louisiana*, 143 F. Supp. 922; *Sterling* v. *Constantin*, 53 S. Ct. 190, 287 U. S. 378; *Green* v. *Frazier*, 40 S. Ct. 499, 253 U. S. 233.

Correlative with the above is the proposition that Federal courts should not decide constitutional questions or questions of hitherto uninterpreted local statutes on the basis of guesswork as to local law. In 1944, in *Spector Motor Company* v. *McLaughlin*, 323 U. S. 101, 65 S. Ct. 152, the [fol. 70] Supreme Court of the United States made it so clear that nobody should misunderstand when it said:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality—here the distribution of the taxing power as between the State and the Nation—unless such adjudication is unavoidable. And so, as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, *we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law.* (Citing cases)." (Emphasis ours.)

Also, to same effect:

> *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220.

This Court, however, has reached a conclusion *that only in equity cases have stay orders been considered a proper exercise of power by the District Courts.* After citing numerous situations, where, in equity matters, the Courts have issued injunctions, the Court concludes, at page 9 of its opinion, that, "The pattern is consistent. All of the cases are equitable." Then, at the bottom of page 9 of its opinion, this Court further concludes:

> "While the doctrine of abstention has been applied only in equity cases. . . ."

This conclusion is not only completely erroneous, but also disregards the basis for the conclusion reached. As [fol. 71] pointed out in our original brief, it is only natural

that we find that all of the cases wherein injunctions are granted or denied were equity cases. This must be so since injunctive relief is an equity remedy, purely and historically. It is also the case in most instances where a stay order is granted or denied since stay orders usually arise out of equitable defenses. But, to say that ALL cases involving stay orders are equitable, or to say that the "doctrine of abstention" has been applied ONLY in equity cases, and is therefore improper in law cases, is to overlook and disregard a respectable and current body of jurisprudence to the effect that in law cases stay orders are permissible within the discretion of the court in the orderly progress of the cause before it.

Now, let us look at some *law* cases where stay orders were considered:

In the only condemnation proceeding we have found wherein a stay order was involved, *United States* v. *150.29 Acres*, 135 F. (2d) 878, the Court had before it a question as to when the land was taken and as to when a lien for taxes attached. The Court of Appeals, Seventh Circuit, IN THIS LAW MATTER, held that:

> "We hesitate to intrude ourselves into a situation that requires us to make a decision as to what the law of Wisconsin is, when we are not able to discern with assurance what that law is. Since we are in doubt as to what the law of Wisconsin is on that point, we think it advisable to remand the case to the District Court [fol. 72] with instructions to retain jurisdiction until the parties can seek the answer to this question in the courts of Wisconsin. (Citing cases)."

The case at bar is a CONDEMNATION proceeding; the citation above was from a CONDEMNATION proceeding.

In *Yellow Cab Co.* v. *City of Chicago*, 186 F. (2d) 946 (C. A., 7th, 1951), the suit was for breach of an ordinance contract whereby the City had agreed not to issue additional taxicab licenses in excess of a certain number. The Court, in that action at LAW, remanded the matter to the District Court with instructions to retain jurisdiction until the parties had an opportunity to obtain authoritative decision in

the Illinois courts since the Court could not determine with certainty the Illinois law on the subject at hand.

General American Tank Car Corp. v. *El Dorado Terminal Co.*, 60 S. Ct. 325, 304 U. S. 422, was a case which came to the United States Supreme Court on an action in assumpsit, CLEARLY A LAW ACTION, to recover money due under a car leasing contract. The Supreme Court held that the action should be STAYED in the District Court pending determination of provisions of the Elkins Act by the ICC.

In *Powell* v. *American Export Lines, Inc.*, 146 F. Supp. 417, a tort suit, AN ACTION IN LAW, was stayed pending disposition of a similar suit in another District Court.

[fol. 73] That a District Court has an inherent power to stay proceedings in a *law* matter in order to control the progress of the cause was made unequivocally clear in the case of *Enelow* v. *New York Life Insurance Company*, 293 U. S. 379, when, at page 381 thereof, the Supreme Court of the United States said:

> "This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, AS DISTINGUISHED FROM A MERE STAY OF PROCEEDINGS WHICH A COURT OF LAW, as well as a court of equity, MAY GRANT IN A CAUSE PENDING BEFORE IT BY VIRTUE OF ITS INHERENT POWER TO CONTROL THE PROGRESS OF THE CAUSE SO AS TO MAINTAIN THE ORDERLY PROCESSES OF JUSTICE. . . ." (Emphasis added).

And in *Landis* v. *North American Company*, 299 U. S. 248, 57 S. Ct. 163, the Supreme Court further stated:

> "Apart, however, from any concession, the power to stay proceedings is incidental to THE POWER INHERENT IN *EVERY* COURT to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (Emphasis added).

We have found nothing which overrules, modifies, or distinguishes these utterances of the United States Supreme

[fol. 74] Court.[2] Nothing could be clearer than the words of the Supreme Court in the *Enelow* case, cited above, recognizing the inherent power of the Court *IN A LAW MATTER* to stay proceedings in order to control the progress of the cause so as to maintain the orderly processes of justice.

If what is said above is not so, then Rule 42 (b) of the Federal Rules of Civil Procedure is meaningless. That section gives the District Courts the discretion to order separate trials of any separate issues. That, in effect, is what the District Court did here; if this Court says it was in error, then it appears that Rule 42 (b) is being read out of the Rules of Civil Procedure.

Although we grant that the point involved here is an obscure one and difficult to bring into clear focus, we respectfully submit that, once focused, it is altogether clear and apparent that:

THE UNITED STATES SUPREME COURT HAS CLEARLY DISTINGUISHED BETWEEN THE ACTS [fol. 75] OF A COURT IN THE EXERCISE OF ITS EQUITABLE JURISDICTION AND A COURT OF LAW ACTING IN A LAW MATTER. THE SUPREME COURT HAS SET FORTH UNEQUIVOCALLY THAT A COURT OF LAW ACTING IN A LAW MATTER MAY STAY PROCEEDINGS BY VIRTUE OF ITS INHERENT POWER TO CONTROL THE PROGRESS OF

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[2] In fact, this ruling has been elaborated upon and discussed in the later case of *United States* v. *Horns*, 147 F. (2d) 57 (CA-3, 1945), in which the Court correctly perceived the fine point involved here, in these words:

"In the Enelow case the Supreme Court, however, made it clear that *if a court of law itself grants a stay in proceedings before it* or a court of equity grants a stay in proceedings before it *the stay is not an injunction. In such a case the stay is granted by virtue of the court's inherent power to control the progress of the cause pending before it so as to maintain the orderly processes of justice.* It is only when the power possessed by a court of equity to stay proceedings in another court is exercised that the court's action amounts to the grant or refusal of an injunction. This distinction was stressed in *Cover* v. *Schwartz*, 2 Cir., 1940, 112 F. (2d) 566, and is controlling here." (Emphasis added.)

THE CAUSE SO AS TO MAINTAIN THE ORDERLY PROCESSES OF JUSTICE.

Wherefore, having shown proper cause for reconsideration and re-determination of the matter set forth, Petitioner for Rehearing prays:

(a) That this Court reconsider and grant oral argument in this matter;

(b) That this Court, upon reconsideration and hearing argument, dismiss the Appellant's appeal; and

(c) That the Petitioner for Rehearing have such other relief as this Court may deem just and proper.

Respectfully submitted,

Peltier & Peltier, Harvey Peltier, Donald Peltier; Monroe & Lemann, J. Raburn Monroe, Melvin I. Schwartzman, /s/ Andrew P. Carter, Attorneys for Louisiana P. & L. Co.

[fol. 77]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16870

CITY OF THIBODAUX, Appellant,

versus

LOUISIANA POWER & LIGHT COMPANY, Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

PER CURIAM ON PETITION FOR REHEARING—July 15, 1958

Before Hutcheson, Chief Judge, and Tuttle and Jones, Circuit Judges.

Per Curiam, It Is Ordered That the opinion of this Court be and it is hereby amended and modified in the following respects:

[fol. 78] 1. The second and third sentences of the first paragraph on page 9 of the opinion of this Court are hereby amended so as to read:

> "The cases are usually equitable. In the Pullman case the principles of equity are declared to be the basis of the doctrine of abstention and these principles were reiterated in the Fieldcrest Dairies opinion."

2. The first sentence of the last paragraph beginning on page 9 of the said opinion is hereby amended so that the same shall read:

> "While the doctrine of abstention has been applied usually in equity cases, including the Magnolia case in bankruptcy, it does not, of course, follow that equity jurisdiction alone is enough to warrant the use of the doctrine." Cf. *Meredith* v. *Winter Haven, supra.*

3. The first paragraph on page 11 of the said opinion is hereby amended so that the same shall read:

> "The expropriation proceeding from which this appeal stems is not one where equitable jurisdiction and the discretion incident to such jurisdiction are present. Nor do we find present any such exceptional circumstances as would require or permit the district court to delay its determination of the case pending a state adjudication of state issues."

With the opinion thus amended and modified, the petition for rehearing is hereby DENIED.

[fol. 79]

IN THE UNITED STATES COURT OF APPEALS

ORDER DENYING REHEARING—July 15, 1958

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 82] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 83]

SUPREME COURT OF THE UNITED STATES.

No. 398—October Term, 1958

LOUISIANA POWER & LIGHT COMPANY, Petitioner,

vs.

CITY OF THIBODAUX

ORDER ALLOWING CERTIORARI—November 17, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted limited to questions 2 and 3 presented by the petition for the writ which read as follows:

"2. Does a United States District Court have the inherent power in a case at law to exercise the discretion of staying proceedings in order to control the progress of the cause before it in an orderly manner?

"3. Assuming that a United States District Court does have discretion to stay proceedings in order to control the progress of a law case before it in an orderly manner, did the District Court abuse that discretion?"

The case is transferred to the summary calendar and assigned for argument immediately following No. 157 and No. 347 which cases are also transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.